TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 159.

D. S. OSBORNE, J. K. P. CARROLL, A. J. BARNES, AND G. L. BAKER, SUING AS TRUSTEES OF CARRICK ACADEMY OF THE COUNTY OF FRANKLIN, &c., PLAINTIFFS IN ERROR,

vs.

R. A. CLARK AND WINCHESTER NORMAL COLLEGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED DECEMBER 8, 1905.

(20,009.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1906.

1 Filed Nov. 20, 1905. Joe J. Roach, Supreme Court Clerk, Tennessee.

In the Supreme Court of the State of Tennessee, at Nashville, Tennessee. In Equity.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

To the Hon. W. D. Beard, Chief Justice of the Supreme Court of the State of Tennessee:

The petition of D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, respectfully show- that on the 22nd day of March 1904, The Supreme Court of the State of Tennessee rendered a decree against your petitioners in the cause of Trustees of Carrick Academy against R. A. Clark and others, in which case your petitioners suing, as Trustees of Carrick Academy, of the County of Franklin, a body politic and corporate, and in their own right as citizens and tax payers of said county, and for and in behalf of the school fund and of the school children of said county, and in behalf of the citizens and taxpayers of said county, were complainants, and R. A. Clark, and the Winchester Normal College, a corporation chartered and organized under the laws of Tennessee, were defendants, denying your petitioners the relief sought by their bill in said cause, dismissing their said bill, and adjudging the costs against them, and awarding execution therefor, as will fully appear by reference to the record and proceedings in said cause under the style aforesaid.

And your petitioners say that said Supreme Court is the highest Court of said State of Tennessee, in which a decision in said suit can or could be had.

Your petitioners now claim the right to remove said decree and proceedings to the Supreme Court of the United States by
2 writ of error, under the statutes of the United States, authorizing writs of error to State Courts, and especially under Section 709 of the Revised Statutes of the United States, because in said cause your petitioners being the complainants therein, there was drawn in question the validity of statutes of the State of Tennessee, and the authority exercised thereunder, on the ground of their being repugnant to the Constitution and laws of the United States; and the decision of the said Supreme Court was in favor of their validity; and because certain rights, privileges and immunities were claimed by your petitioners, under the Constitution of the United States, and the statutes thereof, the decision was against the rights, privileges and immunities claimed by your petitioners, under such constitution and laws of the United States.

Your petitioners claimed and now claim that the charter of the Carrick Academy, an eleemosynary corporation, chartered and organized under the laws of the State of Tennessee, and of which your

petitioners are trustees, is a contract, and that the same was protected by the contract clause of the Constitution of the United States, and that said contract was impaired by an Act of the Legislature of Tennessee, passed March 30th, 1881, and approved April 14th, 1881, undertaking to authorize the then Trustees of Carrick Academy of the County of Franklin to lease its property to the Winchester Normal College, for a period not exceeding fifty years, without consideration, and that the lease contract made by the then Trustees of Carrick Academy of the County of Franklin to the Trustees of the Winchester Normal College, for a period of fifty years, without consideration, under the supposed authority of said Act of the Legislature of Tennessee, and the sub-lease contract made by the said Trustees of the Winchester Normal College to the said R. A. Clark, were null and void, because said Act was repugnant to the Constitution and laws of the United States, and the decision of the said Supreme Court was in favor of the validity of said Act,
3 and because certain rights, privileges and immunities were claimed by your petitioners under the Constitution of the United States and statutes thereof, and the decision was against the rights, privileges and immunities claimed by your petitioners under said Constitution and laws.

Your petitioners claimed that they were protected by the contract clause of the Constitution of the United States and that said Act of 1881 was repugnant to Section 2 of the Act of Congress, approved April 18th, 1806, entitled "An Act to authorize the state of Tennessee to issue grants and perfect titles to certain lands therein described and to settle the claims to the vacant and unappropriated lands within the same." And the decision of the said Supreme Court was averse to their contention and in favor of the validity of said Act undertaking to authorize said lease contract by the Trustees of Carrick Academy of the County of Franklin, to the Trustees of the Winchester Normal College, and against the immunity and protection asserted and claimed by your petitioners, and a decree was rendered against your petitioners as aforesaid; all of which will appear by reference to the records and proceedings in said cause.

Wherefore your petitioners pray the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation, and your petitioners will ever pray &c.

D. S. OSBORNE,
J. K. P. CARROLL,
A. J. BARNES,
G. L. BAKER,
Petitioners.

ISAAC W. CRABTREE,
LYNCH & LYNCH,
ESTILL & LITTLETON,
Attorneys for Petitioners.

Let the writ of error issue as prayed.
This the 11th day of November, 1905.

W. D. BEARD,
Chief Justice of the Supreme Court of Tennessee.

4 Filed Nov. 20, 1905. Joe J. Roach, Clerk.

In the Supreme Court of Tennessee.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

Assignment of Errors.

And now come D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, suing as Trustees of Carrick Academy of the County of Franklin, a body politic and corporate, and in their own right as citizens and taxpayers of said county, and for and in behalf of the school fund and of the school children of said county, and in behalf of the citizens and taxpayers of said county, complainants and plaintiffs in error, by their Solicitors and respectfully represent that they feel themselves to be aggrieved by the proceedings and decree of the Supreme Court of the State of Tennessee in the above entitled cause, and they assign errors thereto as follows, to wit:

I.

That said Court erred in finding and decreeing that the said complainants were not entitled to the relief sought in and by their bill, and in denying them such relief and dismissing their said bill with costs.

II.

That the Supreme Court erred in finding and adjudging that Carrick Academy of the County of Franklin, incorporated by the Legislature of the State of Tennessee, was a mere educational agency of the State, and was a public corporation under the control of the Legislature, and that Chapter sixty-three of the Acts of the General Assembly of 1881, authorizing the Trustees of said Academy to lease the Academy property to the Trustees of the Winchester Normal College is valid and constitutional; and that the lease contract
5 made by the Trustees of said Academy to the Trustees of said College under the authority of said Act of 1881, was valid and binding on said academy corporation.

III.

Because the Court did not find and adjudge that Carrick Academy of the County of Franklin is a private corporation, and its charter the declaration of a trust and a contract, and that the Act of the General Assembly of the State of Tennessee, being Chapter Sixty-three of the Acts of 1881, entitled: "An Act to authorize the Trustees of Carrick Academy to lease the academy property to the Trustees of the Winchester Normal College," was in violation of the contract clause of the Federal Constitution, and diverted the trust fund that said academy corporation was chartered to administer, and repugnant to Section II of the Act of Congress approved April 18th, 1806, entitled:

"An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;" and impaired the contract to which the donors, trustees of said academy corporation, the beneficiaries and the State were parties; and that the lease contract made under the authority of said Act of 1881 was null and void.

IV.

That in the Chancery Court held at Winchester in Franklin County Tennessee, being the Court which had and exercised original jurisdiction of said cause, said several complainants being the plaintiffs in error herein, suing as aforesaid, specifically set up and claimed that Carrick Academy of the County of Franklin was organized under the laws of the State of Tennessee to administer a trust, and that its charter was the declaration of a trust, and a contract to which the donors, the Trustees, the beneficiaries and the State were parties; that the Act of the General Assembly of said State, passed March 30, 1881, and approved April 4th, 1881,
6 entitled: "An Act to authorize the trustees of Carrick Academy to lease the academy property to the trustees of the Winchester Normal College," being Chapter sixty-three of the Acts of 1881, was unconstitutional and void, because it impaired the obligation of said contract and was repugnant to Section X Article I of the Constitution of the United States, and in contravention of Section II of the Act of Congress approved April 18th, 1806, entitled: "An Act to authorize the State of Tennessee to issue grants to perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same"; and complainants being plaintiffs in error herein, questioned the validity of the authority of the Trustees of said Academy, exercised under said Act, upon the ground of its being repugnant to the Constitution of the United States, and in contravention of Section II of said Act of Congress; and the decision of the said Chancery Court at Winchester, in Franklin County Tennessee, was against the validity of said Statute and the authority exercised thereunder, so far as it affected complainants, and in favor of the immunity claimed by complainants; but upon appeal to the said Supreme Court of the State of Tennessee, the decision of the Supreme Court was in favor of the validity of said Statute, and the authority exercised thereunder, and against the privilege and immunity and right claimed by the said complainants under the said Constitution and laws of the United States, and particularly under the contract clause of said Constitution, and the Act of Congress aforesaid; and said complainants say that the said Supreme Court erred in deciding in favor of the validity of said Statute of the State of Tennessee, and of the authority exercised thereunder, and against the rights, privileges and immunities so set up and claimed by said complainants, under aforesaid provision of the Con-
7 stitution of the United States, and the Act of Congress aforesaid.

Wherefore the said D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, plaintffs in error, suing as aforesaid, pray for a

writ of error to the end that the Supreme Court of the United States may examine and correct the errors assigned in said findings and decree of the Supreme Court of Tennessee, and for a reversal of the decree entered by the Supreme Court of the State of Tennessee in the above entitled case and they will ever pray &c.

ISAAC W. CRABTREE,
LYNCH & LYNCH,
ESTILL & LITTLETON,
Attorneys for Plaintiffs in Error.

8 *Writ of Error.*

Filed Nov. 20, 1905. Joe J. Roach, Clerk Supreme Court, Tennessee.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Tennessee, before you or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in the suit between D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, suing as Trustees of Carrick Academy of the County of Franklin, a body politic and corporate and in their own right as citizens and taxpayers of said county, and for and in behalf of the school fund and school children of said county, and in behalf of the citizens and taxpayers of said County, complain-ts and plaintiffs in error, and R. A. Clark, and the Winchester Normal College, a corporation organized and chartered under the laws of Tennessee, defendants and defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the right, title, privilege or exemption, specially set up or claimed under such clause of said Constitution, treaty, statute or commission, a manifest error has happened to the great damage of the said D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, suing as aforesaid, plaintiffs in error, as by their complaint appears.

9 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this

writ, so that you may have the same in the said Supreme Court at Washington, within thirty days from the date hereof; that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 11th day of Nov. in the year of our Lord, 1905.

H. M. DOAK,
Clk U. S. Cir. Ct, M. D. of T.

Allowed by the Hon. W. D. Beard, Chief Justice of the Supreme Court of Tennessee, this 11th day of Nov. 1905.

W. D. BEARD,
Chief Justice of the Supreme Court of the State of Tennessee.

10 UNITED STATES OF AMERICA, *ss:*

To R. A. Clark and the Winchester Normal College, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, wherein D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, suing as Trustees of Carrick Academy of the County of Franklin, a body politic and corporate, and in their own right as citizens and taxpayers of Franklin County, and for and in behalf of the school fund and of the school children of said County, and in their own behalf as citizens and taxpayers of said county, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in their behalf.

Witness the Hon. W. D. Beard, Chief Justice of the Supreme Court of the State of Tennessee, this the 11 day of Nov. one thousand nine hundred and five.

W. D. BEARD,
Chief Justice of the Supreme Court of the State of Tennessee.

I, H. H. Horton, president of the Board of Trustees of the Winchester Normal College, hereby acknowledge service of this (the above) citation, a copy of the same having been this day delivered to me.

Nov. 20, 1905.

H. H. HORTON,
President of the Board of Trustees of the Winchester Normal College.

[Endorsed:] In U. S. Supreme Court. No. — Trustees of Carrick Academy *vs.* R. A. Clark, *et al.* Filed in my office this Nov. 22d, 1905. Joe J. Roach, Clerk Supreme Court, Tennessee. Received at Winchester Nov. 21, 1905, and executed by reading the within citation to R. A. Clark, and by delivering him a copy of the same this Nov. 21, 1905. L. W. Willis, De'ty U. S. Marshal for the Middle Dist. of Tennessee.

11 Filed Nov. 20, 1905. Joe J. Roach, Clerk Supreme Court, Tennessee.

UNITED STATES OF AMERICA, *ss:*

To R. A. Clark and the Winchester Normal College, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, wherein D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, suing as Trustees of Carrick Academy of the County of Franklin, a body politic and corporate, and in their own right as citizens and taxpayers of Franklin County, and for and in behalf of the school fund and of the school children of said County, and in their own behalf as citizens and taxpayers of said county, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in their behalf.

Witness the Hon. W. D. Beard, Chief Justice of the Supreme Court of the State of Tennessee, this the 11 day of Nov. one thousand nine hundred and five.

W. D. BEARD,
Chief Justice of the Supreme Court of the State of Tennessee.

Copy of citation.

12 Transcript of the Record and Bills of Cost remaining in my office in the cause of,—

Filed Oct. 13, 1903. Joe J. Roach, Clerk.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

Bill, Original. Filed January 19th, 1903.

The bill of complaint of D. S. Osborne, J. K. P. Carroll, A. J. Barnes, and G. L. Baker, who sue as Trustees of Carrick Academy, of the County of Franklin, a body politic and corporate, and in their own rights as citizens and tax payers of Franklin County, and for and on behalf of the school fund and of the school children, as well as on behalf of the citizens and tax payers of Franklin County, all of complainants being citizens of said County of Franklin, against R. A. Clark and R. C. Baker, citizens of said county, and the County of Franklin and the Winchester Normal College, a corporation organized and chartered under the laws of Tennessee, and having its citus in said county, defendants.

To the Honorable T. M. McConnell, Chancellor, holding Court at Winchester:

Complainants would respectfully show the Court,

I.

That after the admission of the State of Tennessee to the Union, and in 1799, a dispute arose between the State and the United States as to which had the right to dispose of the vacant and unap-
13 propriated lands in the State. In the meantime the State of North Carolina continued to issue warrants and perfect titles to lands in Tennessee in the same manner as if no cession had been made. Tennessee denied the right of the State — North Carolina to do this. In 1803, the Legislature of Tennessee appointed an agent for the purpose of settling the differences between North Carolina and Tennessee by friendly explanation and adjustment. This negotiation resulted in an agreement authorizing the State of Tennessee to perfect titles to lands reserved to North Carolina by the Act of Cession, subject — the assent of Congress.

II.

Congress gave its assent to the agreement between the two States and entered into a compact settling the controversy between the United States and Tennessee by an Act approved April 18th, 1806. Under the terms of this Compact the State of Tennessee ceded to the United States certain territory described in the Act. The United States ceded to Tennessee the lands east and North of the Congressional Line subject to the following conditions:—

1. Tennessee should satisfy all North Carolina Land Claims out of the territory ceded to it.

2. It should appropriate 100,000 acres, to be located in one entire

tract, for the use of two colleges, one in East and one in West (Middle) Tennessee.

3. It should appropriate 100,000 acres in one entire tract for the use of Academies, one in each county of the State.

4. It should, in issuing grants and perfecting titles, locate 640 acres to every six square miles in the Territory ceded to it,
14 where existing claims would allow the same, which should be appropriated for the use of schools forever.

5. That the College and Academy lands should not be sold for less than two dollars per acre.

III.

By Acts of the General Assembly at the session of 1806 two colleges were incorporated and established. At the same session Academies were incorporated and established in all counties of the State, and as new Counties were organized, Academies were chartered and established for them.

IV.

The Act of Congress was ratified and confirmed by an Act of the General Assembly of the State of Tennessee passed in 1806. The College lands were disposed of from time to time, agreeable to the Act of Congress, and the Act ratifying and confirming the same, and the funds arising from the sales were applied to the building equipment and maintenance of two colleges, one at Knoxville (The University of Tennessee) and the other at Nashville (The University of Nashville and Peabody Normal), the names of the two colleges having been changed from time to time, and in like manner the funds arising from the sale of the Academy lands, were prorated among the Academies, as contemplated by the Acts of Congress and the Legislature of Tennessee.

V.

By an Act of the General Assembly of 1809 the Carrick Academy was granted a charter, to be known as the Trustees of the Carrick Academy of the County of Franklin.

15 VI.

After having perfected an organization under its charter, the Trustees acquired the following tract of land in the town of Winchester, Franklin County, Tennessee and bounded as follows:

Bounded on the north by a street; on the east by a street; on the south by the property of M. N. Whitaker and on the west by the property of C. B. Russey, upon which they erected a substantial brick building, and with its pro rata of the funds arising from the sale of the academy lands and other sources, and the trustees conducted a successful school for a long period of years, and until the fund arising from the sale of the academy lands had been exhausted. The operation of the academy under the direction of its trustees and the fostering care of the State continued up to the breaking out of the war between the States.

VII.

After the war the property of the Corporation was used more or less for a public school, and when not so used was leased to individuals to be used, and was used, for private schools until the year 1870, when the defendant Clark, took possession of the property, and has continued to use it from that time to the present, and is now in possession of it, using it to carry on a college known as the Winchester Normal College, and in which children are taught from A B C to graduation, when diplomas are given and degrees are conferred. The defendant operates his college as a private enterprise for profit, and although he has grown rich as a result of his thrift and ability in the management of the college enterprise, he has never paid a dollar for the use of the property.

VIII.

16 When the County Academies were first established, the members of the Board of Trustees were elected, and vacancies in the Boards were filled by the Legislature, but previous to the Code of 1858, the law was changed and the County Courts of the several Counties of the State were authorized to elect five trustees biennially. The County Court of Franklin, at its July term 1877, elected B. Dufield, J. L. Baugh, G. G. Phillips, W. W. Garner and T. J. Gaines, Trustees of the Carrick Academy, and thereafter, on the 11th day of May 1878, said Trustees undertook to lease the buildings and grounds of the Carrick Academy to J. W. Terrill, J. M. Bledsoe, and the defendant R. A. Clark for a period of five years with the privilege of renewal for ten years longer. The pretended lease was probably renewed at the expiration of five years, the original lease is of record in the Register's office of Franklin County, but there is no public record of the renewal. At the expiration of the fifteen years, and in about the year 1890, the said Terrill and Bledsoe withdrew from the school, the former going to Dechard, and the latter to Scotsboro, Ala., to engage in teaching. The lease to said Terrill, Bledsoe, and defendant Clark was for the nominal sum of one dollar per annum. After the departure of said Terrill and Bledsoe, the Defendant Clark took charge of the buildings and grounds of the Academy, and has, as before stated, conducted a school for his own benefit and behoof, employing a corps of teachers to assist in his work. He continued in charge of said property using it for his own purpose and for his own benefit, without the shadow of authority or claim of right until the year 1898, when the County Court of Franklin County undertook to lease said property to the Trustees of the Winchester Normal, a corporation charterd under the general laws of the State in the year 1878, in consideration of its keeping the property insured in the sum of $6,500.00. Said corporation has no property
17 of any kind whatever, and never did have, and defendant Clark merely used its name and the influence of its incorporators and Board of Trustees to further the interests of his private enterprise. Complainants are informed that defendant Clark claims to hold their property under and by virtue of — the County Court at its July term, 1898, and as sub-lessee of the Winchester Normal.

IX.

Complainants are advised that said order of the County Court is void and of no binding effect upon them for the reason that the County Court has no authority, jurisdiction or control of the property of the trustees of the Carrick Academy other than to elect five trustees for the corporation biennially. The title to the property in suit was conveyed to the trustees, and by the Act incorporating the Academy the exclusive power and authority to dispose of its property was vested in the Trustees, which has never been changed, altered or amended in any respect whatever. The defendant Clark has not even kept the property, the use of which he has had all of these years, in repair, but this has been done by the citizens of the town and County. He has not even paid the insurance premiums, but they have been paid partly by popular subscription, and a part of them have been paid out of a fund raised by a special tax levied on the taxable property of the taxing District of Winchester to raise a fund for the public school taught in the town of Winchester. By what authority or by what means this fund was diverted complainants are unable to state, or for that matter to imagine, but certain it is that a part of this fund has been expended, as complainants have been informed, and this has been going on for years.

18

X.

Complainants show the Court that said property is very valuable, and is and has been of the rental value of $1,000.00 per annum during the time it has been in the possession of and occupied by the defendant Clark. The parcel of land upon which the buildings are situated contains about five acres, covered with blue grass and shaded by forrest oaks and other beautiful shade trees. The buildings are large and commodious, and the property will sell for a large amount.

XI.

As hereinbefore stated, it was provided in the compact of 1806 that in addition to the lands set apart for colleges and academies, that where existing claims would permit, 640 acres in every six square miles of the territory north and east of the Congressional line should be appropriated for the use of schools for the instruction of children forever. This endowment which seems so magnificent on its face, failed practically on account of the interference of "existing claims" but fund- arising from the sale of these formed the first fund for common schools in the State, and it gave the first impetus to the public school system in the State. The first public school law was passed in 1823. For many years the State made feeble efforts to encourage public schools. Laws were passed in 1829, 1837 and 1844-5, but these laws were little more than statutory exhortations and radically defective in failing to provide adequate revenue for the support of the schools. The results of the Civil War changed the whole aspect of public education in Tennessee. Public sentiment in favor of an effective system culminated in the Act of 1873. The system inaugurated under this Act, and the Acts amendatory thereto, is a good

one, a lack of funds to keep the schools in session for a sufficient length of time being the greatest drawback, and complainants
19 allege that the public schools in Franklin County are greatly in need of funds to the end that the school terms may be prolonged.

XII.

The defendant through its County Court has assumed the management and control of the property of the trustees of the Carrick Academy without authority or warrant of law. This has not been done by the Court in an officious or meddlesome manner at all, but its action in regard to this property has always been taken at the instance of defendant Clark and his friends and advisors. Indeed complainants are of the opinion that the members of the County Court in common with the majority of the community have been laboring under the apprehension that the property belonged to the County and that the County Court was its legal custodian, whereas the only authority the County Court had was to elect five trustees biennially.

Complainants charge that the County Court was entirely in ignorance of the rights of Carrick Academy in and to this property, and the real interest the public had in and to this property. The matter of the disposition of it was brought to the attention of the Court in a summary matter of course, way that threw the Court off its guard.

XIII.

Complainants show the Court that they and defendant Baker were elected trustees of the Carrick Academy by the Quarterly Court of Franklin County at its October term 1902.

XIV.

Complainants and defendant Baker are the first Trustees elected by the County Court for the Carrick Academy since the elec-
20 tion of Dufield, Baugh and Garner, Gaines and Phillips at the July term, 1877. During the fifteen years that Terrill, Bledsoe and Clark had the property of the Academy in charge they operated the school nominally under the supervision of the Trustees of the Winchester Normal —, but in point of fact, these three gentlemen and their associate teachers operated the college as a private enterprise for profit, just as defendant Clark has operated it for such purpose since he took charge of it after the expiration of the Terrill, Bledsoe and Clark lease. To show the Court the action of the County Court in this matter was induced by the intervention of the friends of these teachers and not with a view to the interest of the people who really owned the property, complainants would state that all the Trustees for Carrick Academy, who were elected at the July term 1877, viz: Dufield, Baugh, Garner, Gaines and Phillips were all members of the Board of Trustees of the Winchester Normal —, and were active participants in obtaining the charter and organization of that corporation, and the lease to Terrill, Bledsoe and Clark was

in substance and effect a lease by themselves to themselves. The defendant Clark has also operated the school since the expiration of the lease in the name of said Corporation, but he has managed the institution himself, paying the teachers, and after doing so, has appropriated all the profits to his own use and behoof, and, as before stated, has grown rich in the operation of this enterprise.

Complainants further show the Court that since the foregoing parts of the bill were drawn, they have discovered that on the 22nd day of December, 1881, T. J. Gaines, J. L. Baugh, G. G. Phillips and W. W. Garner undertook as Trustees of the Carrick
21 Academy to lease the property of the Academy to the Winchester Normal College for a period of fifty years, which said pretended lease is registered in Trust Book No. 2 pp. 433-4 R. O. F. C. and the said lease recites that the same is made under and by virtue of the Act of the General Assembly passed March 30th, 1881, authorizing the Trustees of the Carrick Academy to lease the property to the Winchester Normal College for a period not exceeding fifty years, etc. A copy of said pretended lease is herewith exhibited and marked "A," but the same need not be copied.

Complainants charge that said pretended lease is void and of no effect, and has no binding force on complainants and defendant Baker as the trustees of the Carrick Academy for the following reason-:

1. Because the then trustees of the Carrick Academy were without authority of law to make said lease without consideration.

2. Because said Gaines, Baugh, Garner, Phillips, Trustees of the Carrick Academy were also trustees of the Winchester Normal —, and said lease is void for this reason.

3. Because said Act undertook to authorize the Trustees of the Carrick Academy to appropriate its property to the use of another.

4. Because said Act is in conflict with Sec. 8, Art. 1, of the Constitution of Tennessee, which inhibits the taking of a person's property except by the law of the land.

5. Because said Act is in conflict with Sec. 21, Art. 1, of the Constitution of Tennessee, which inhabits the taking of a person's property for public use without just compensation being made therefor.

6. Because said Act undertakes to authorize the taking of public property for private use.

7. Because said Act is in violation of Sec. 8, Art. 11, of the Constitution of Tennessee, which inhibits the passage of any
22 law for the benefit of individuals inconsistent with the general laws of the land; or to pass any law granting any individual or individuals rights, privileges or immunities other than such as may be by law extended to any member of the community who may be able to bring himself within the provision of such law, and said Act is particularly in conflict with that part of the provision of the Constitution which prohibits the Legislature from increasing or diminishing by *special laws* the powers of a corporation.

8. Because said Act is in conflict with the provision of the Constitution which prohibits class legislation.

The defendant Clark claims to hold said property under the Winchester Normal College as sub-lessee, and has carried on his college in the manner herein before alleged.

Premises seen, complainants pray:

That the parties named as such in the caption be made such by proper process; let them answer, but they are excused from answering under oath; at the hearing decree that the complainants and defendant Baker as trustees are owners and entitled to the possession of the property hereinbefore described. Decree that complainants and defendant Baker are entitled as such trustees to recover the full value of the rents of said property of the defendant Clark from the date of the expiration of the lease of Terrill, Bledsoe and Clark to the present time, and, if necessary, let cause be referred to the Master to take and state an account. Pronounce a decree declaring the lease from the trustees of the Academy to the defendant college void. eLt a decree be pronounced in favor of the Trustee directing a sale of the Academy property, and let the funds arising
23 from the sale and rents recovered, as hereinbefore sought, be paid into the Treasury of the County of Franklin for the benefit of the school fund. Grant all such other and further relief as complainants may be entitled to. Grant General Relief.

IKE W. CRABTREE,
LYNCH & LYNCH,
ESTILL & LITTLETON,
Sols. for Complainants.

We go security for costs:
IKE W. CRABTREE,
LYNCH & LYNCH,
ESTILL & LITTLETON,
By FLOYD ESTILL.

EXHIBIT "A" TO BILL. Filed Jan. 19th, 1903.

(Trustees of Carrick Academy to Trustees of Winchester Normal —.)

(Trust Book No. 2, pp. 433-4.)

Whereas the undersigned (John Simmons) J. L. Baugh, G. G. Phillips, T. J. Gaines and W. W. Garner are the Trustees of Carrick Academy, a corporation incorporated by the Legislature of Tennessee, and whereas the Legislature passed March 30th, 1881, and approved 14th of April, 1881, an Act providing as follows: "That the Trustees of Carrick Academy are hereby authorized to lease the Academy property to the Winchester Normal College for any period not exceeding fifty years; that if the lease is made it shall be the duty of the Trustees of the said College to keep the property in good condition, and free from debt or incumbrance of any kind, and a failure to comply with these requirements
24 shall render the lease null and void," and whereas the Winchester Normal College is a corporation incorporated under

the laws of the State of Tennessee, and the Trustees thereof are as follows: B. Dufield, T. J. Gaines, W. W. Garner, G. G. Phillips, J. K. Bennett, W. H. Brannan, J. L. Baugh, J. M. Anderson and J. Kasserman, John Simmons, A. S. Marks, H. R. Moore, Henry Finch, William Taylor, W. B. Gray, Jas. H. Davis, H. G. Hampton, C. C. Estill, Jas. H. Holman, J. B. Fitzpatrick, S. D. Mather; and whereas the Board of Trustees of the Winchester Normal College by resolution have agreed to accept the lease provided for in said Act upon the terms and conditions prescribed therein; and whereas by a lease existing when said Act was passed *to* J. W. Terrill, R. A. Clark and J. M. Bledsoe, were entitled to the property until the 10th day of May, 1893; now therefore, in consideration of these premises aforesaid, and for the further consideration that the said Winchester Normal College and the trustees thereof agree*d* to have and put on said property valuable improvements, and have agreed to comply with the requirements of said Act, we, the undersigned, as Trustees of Carrick Academy, and in pursuance of the power vested in us by said Act, do hereby lease to the Trustees of the Winchester Normal College, for a period of fifty years, the Academy property belonging to Carrick Academy, and consisting of a lot situated within the corporate limits of Winchester, containing about five acres, more or less, bounded on one side by Jefferson Street; on another by a lot of Wm. McNabb; on another by lot of Jas. M. Russey, and on another by a street between the lot herein conveyed and the property of Miss Julia Curl and Mrs. Susan Bethel, together with all the improvements hereon and it is intended that this lease shall be as full and effective as is authorized by said Act, but
25 no further or otherwise.

This 22nd day of December, 1881.

T. J. GAINES.
J. L. BAUGH.
G. G. PHILLIPS.
W. W. GARNER.

Witnesses to W. W. Garner's signature:
M. P. HINES,
S. W. HOUSTON.

(Acknowledged by the bargainors before Clem Arledge, County Court Clerk, January 4th, 1882) Registered January 5th, 1882) Trust Book "2" pp. 433-4.

26 *Order at January Term,* 1903.

MONDAY MORNING, *January 26th,* 1903.

It being the 4th, Monday in said month and the time fixed by law for holding the Regular Term of the Chancery Court for Franklin County, Tennessee. This morning Court met pursuant to adjournment; Present the Hon. T. M. McConnell, Chancellor &c., of this the 3rd Chancery Division of Tennessee, presiding, when the following proceedings were had, to-wit:—

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

By consent, the defendants have until the June term 1903, in which to make defense to complainants' bill.

Demurrer of Winchester Normal College. Filed May 20th, 1903.

In Chancery at Winchester.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

The defendant the Winchester Normal College demurs to the bill filed against it and others in this cause on the following grounds, to-wit:—

1. Because complainants are not shown to have such interest as entitles them to maintain this suit.

2. Because no sufficient ground is shown in the bill to entitle the complainants to recover the relief therein sought:

3. Because in so far as it undertakes to recover rent or moneys whose payment accrued more than six years prior to the in-
27 stitution of this suit, such recovery is barred by the statute of limitations of six years:

4. Because no sufficient ground is shown in the bill to impeach the validity of the lease of 1881 therein referred to from the trustees of Carrick Academy to Winchester Normal College:

5. Because the Trustees of Carrick Academy had express corporate authority to make said lease of 1881 to the Winchester Normal school:

6. Because the Trustees of Carrick Academy had the inherent right to make said lease of 1881 irrespective of any legislative act:

7. Because the said lease of 1881 was, as is specifically shown in the bill, expressly authorized by act of the Legislature:

8. Because the said lease of 1881 has been ratified and affirmed by long acquiescence therein with full knowledge:

9. Because complainants are estopped to impeach the validity of said lease of 1881.

10. Because in so far as this suit undertakes to recover possession of the real property described in the bill, such recovery is barred, by reason of the fact that, as shown in the bill, this defendant has been in the undisturbed enjoyment and quiet possession of the premises in controversy for the space of three entire years together next preceding the institution of this suit, during which time the estate of this defendant has not determined.

11. Because in so far as this suit undertakes to recover the real property described in the bill, such right of recovery, if it ever existed, accrued more than seven years prior to the institution of this suit,

and is, therefore, barred by the statute of limitations of seven years.

28 12. Because, in so far as this suit undertakes to have a sale of the property in controversy, it will not lie, for the reason that no ground whatever is shown to warrant or authorize this Court in taking such a course.

GRANBERRY & TRABUE,
Solicitors for Defendants.

29 *Demurrer of R. A. Clark. Filed May 29th, 1903.*

In Chancery at Winchester.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

The defendant R. A. Clark demurs to the bill filed against him and others in this cause on the following grounds to-wit:—

1. Because complainants are not shown to have such interest as entitles them to maintain this suit.

2. Because no sufficient ground is shown in the bill to entitle complainants to recover the relief therein sought.

3. Because in so far as it undertakes to recover rents or moneys whose payment accrued more than six years prior to the institution of this suit, such recovery is barred by the statute of limitations of six years.

4. Because no sufficient ground is shown in the bill to impeach the validity of the lease of 1881 therein referred to from the Trustees of Carrick Academy to Winchester Normal School.

5. Because the Trustees of Carrick Academy had the express corporate authority to make said lease of 1881 to the Winchester Normal School.

6. Because the Trustees of Carrick Academy had the inherent right to make said lease of 1881 irrespective of any legislative act

7. Because the said lease of 1881 was, as is specifically shown in the bill, expressly authorized by act of the Legislature.

8. Because the said lease of 1881 has been ratified and affirmed by long acquiescence therein with full knowledge.

30 9. Because complainants are estopped to impeach the validity of said lease of 1881.

10. Because in so far as this suit undertakes to recover from this defendant rent or moneys for the use and occupation of said property, such recovery will not lie, for the reason that, as shown in the bill, this defendant has continuously occupied said property as tenant, in good faith, under a lease from the Winchester Normal College, and is not in arrears under the terms of said lease.

11. Because in so far as this suit undertakes to recover possession of the real property described in the bill, such recovery is barred by the reason of the fact that, as shown in the bill, this defendant

has been in the uninterrupted enjoyment and quiet possession of the premises in controversy for the space of three entire years together next preceding the institution of this suit, during which time the estate of this defendant has not been determined.

12. Because in so far as this suit undertakes to recover the real property described in the bill, such right of recovery, if it ever existed, accrued more than seven years prior to the institution of this suit, and is, therefore, barred by the statute of limitations of seven years.

13. Because in so far as this suit undertakes to have a sale of the property in controversy, it will not lie for the reason that no ground whatever is shown to warrant or authorize this Court in taking such a course.

GRANBERY & TRABUE,
Solicitors for Defendants.

31 *Pro Confesso at June Term*, 1903.

MONDAY MORNING, *June 8th*, 1903.

It being the 2nd, Monday in said month and the time fixed by law for holding the Regular Term of the Chancery Court for Franklin County, Tennessee. This morning Court met pursuant to adjournment; Present the Hon. T. M. McConnell, Chancellor &c., of this the 3rd Chancery Division of Tennessee, presiding, when the following proceedings were had to-wit:—

FRIDAY MORNING, *June 12th*, 1903

This morning Court met pursuant to adjournment; Present and presiding the Hon. T. M. McConnell, Chancellor &c., when the following proceedings were had to-wit:—

Pro Confesso.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

In this cause it appearing that the defendant R. C. Baker and Franklin County have been regularly served with process from this Court more than five days before the first day of this term of the Court and that they have failed to plead, demur, answer or otherwise make defense to complainants' bill, it is therefore ordered upon motion of solicitors for complainants that said bill be taken for confessed and set for hearing *ex parte* as to said defendants.

32 *Decree on Demurrers at June Term*, 1903.

MONDAY MORNING, *June 8th*, 1903.

It being the 2nd, Monday in said month and the time fixed by law for holding the regular term of the Chancery Court for Frank-

lin County, Tenn., This morning Court met pursuant to adjournment; Present the Hon. T. M. McConnell, Chancellor &c., of this the 3rd. Chancery Division of Tennessee, presiding, when the following proceedings were had to-wit:—

WEDNESDAY MORNING, *June 17th*, 1903.

This morning Court met pursuant to adjournment; Present and presiding the Hon. T. M. McConnell, Chancellor, &c., when the following proceedings were had, to-wit:—

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

This cause came on this day to be heard before the Hon. T. M. McConnell, Chancellor &c., upon motion to dispose of the demurrers of defendants R. A. Clark and the Winchester Normal College to Complainants' bill, upon consideration whereof the Court was of the opinion that the said demurrers were not well taken, and thereupon ordered, adjudged and decreed that the said demurrers be overruled, and said defendants be allowed thirty days within which to answer complainants' said bill.

From the foregoing decree overruling the said demurrers defendants R. A. Clark and the Winchester Normal College pray an appeal to the next term of the Supreme Court at Nashville, which is granted, upon the said defendants executing proper appeal bond therefor, which is done.

33 *Appeal Bond of Winchester Normal College. Filed June 17/03.*

Known all men by these presents: That we, The Winchester Normal College principal, and S. M. Alexander surety, are held and firmly bound unto D. S. Osborne, *et al.*, Trustees of Carrick Academy or their certain attorneys, Executors, Administrators or Assigns, in the penal sum of Two Hundred Fifty (250.00) dollars for the true payment whereof we bind ourselves, our heirs, Executors and Administrators, firmly by these presents.

Signed and dated this 17th, day of June 1903,

The condition of the above obligation is such, That whereas, the above bound Winchester Normal College has prayed for and obtained an appeal from the Chancery Court at Winchester, for Franklin County, to the Supreme Court of this State at its next term, to be held at Nashville, in the State of Tennessee, from a decree rendered by said Chancery Court at Winchester at its June Term 1903 in the case of Trustees of Carrick Academy, *vs.* R. A. Clark, *et al.*

Now if the said Winchester Normal College shall well and truly prosecute its said appeal with effect, or in case it fail therein, pay and satisfy the damages and costs which may be awarded against it for wrongfully prosecuting said appeal, and satisfy the judgment of

said Supreme Court thereon, then the above obligation to be void, else to remain in full force and effect.

WINCHESTER NORMAL COLLEGE,
By T. J. GAINES, *President.*
S. M. ALEXANDER, *Security.*

34 *Appeal Bond of R. A. Clark. Filed June 17th,* 1903.

Know all men by these presents: That we, R. A. Clark, Principal and S. M. Alexander, surety, are held and firmly bound unto D. S. Osborne, *et al.,* Trustees of Carrick Academy or their certain attorneys, Executors, Administrators, or Assigns, in the penal sum of Two Hundred and Fifty ($250) Dollars for the true payment whereof we bind ourselves, our heirs, Executors, Administrators, firmly by these presents.

Signed and dated this the 17th day of June, 1903.

The Condition of the above obligation is, such that whereas, the above bound R. A. Clark has prayed for and obtained an appeal from the Chancery Court at Winchester for Franklin County, to the Supreme Court of this State at its next term, to be held at Nashville, in the State of Tennessee, from a decree rendered by said Chancery Court at Winchester at its June term 1903, in case of Trustees of Carrick Academy, *vs.* R. A. Clark, *et al.,*

Now if the said R. A. Clark shall well and truly prosecute his said appeal with effect, or in case he fail therein, pay and satisfy the damages and costs which may be awarded against him for wrongfully prosecuting said appeal, and satisfy the judgment of said Supreme Court thereon, then the above obligation to be void, else to remain in full force and effect.

R. A. CLARK.
S. M. ALEXANDER, *Surety.*

35 *Bill of Cost.*

State Tax	$2.50
County Tax	2.50
David Lynch, C. & *N.* Flg. Bill 25c., Pros. Bond 25c., Reg. Same 25c., Copy Bill $3.50, attest 25c. Sub. to Ans. 75c., 2 orders 50c. Flg. Demurrer of R. A. Clark 25c., Notice 25c., Flg. Demurrer of Winchester Normal College 25c., Notice 25c., Order Pro Confesso 50c., Final decree overruling demurrers 75c., Ent. same 25c., 3 dockets 30c., 5 rules 50c., Taxing cost 50c.,	9.55
Jas. A. Stewart Shff., Ex. Sub. To Ans. (2 def'ts)	2.00
	$16.55
C. & M. 2 Appeal Bonds $1.50, Transcript $8.00, Seal 25c., Cert. 25c.,	10.00
	$26.55

STATE OF TENNESSEE, *Franklin County:*

I, David Lynch, Clerk & Master of the Chancery Court for Franklin County, Tennessee, do hereby certify that the above and foregoing is a true and perfect transcript of the records and bills of cost remaining in my office in the cause of Trustees of Carrick Academy, *vs.* R. A. Clark, *et al.* as the same appears from the records in my office.

Witness my hand and seal of office this the 10th day of September, 1903.

(Signed) DAVID LYNCH,
Clerk & Master,
By P. H. WILLIAMS,
Deputy Clerk & Master.

36 STATE OF TENNESSEE:

Be it remembered, that at a Court of Chancery Appeals begun and held at the Capitol, in the City of Nashville, on the first Monday in September, 1903, it being the 7th day of September, 1903; neither Judge attending, I adjourned the Court until to-morrow morning at 9 o'clock.

JOE J. ROACH, *Clerk.*

TUESDAY, *September* 8, 1903.

Court met pursuant to adjournment—present, the Hon. Judges S. F. Wilson and Geo. T. White, Special Judge, commissioned by the Governor to serve in the place of John M. Taylor, who is sick; thereupon the Court announced that the condition of the docket in the Eastern Division of the State was such as to demand an immediate special term of the Court in that division; thereupon the Court adjourned until Monday, October 12, 1903, at 2 o'clock P. M.

WEDNESDAY, *February* 3, 1904.

3, Franklin Eq.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

This cause came on to be heard upon a transcript of the record from the Chancery Court of Franklin County, assignments of error, reply brief and argument of counsel; upon consideration whereof the Court is of opinion that there is no error in the decree of the Chancellor.

It is therefore ordered, adjudged and decreed by the Court that the decree of the Chancellor be affirmed, the demurrers of the defendants overruled, and the cause remanded to the Chancery Court of Franklin County for answer and further proceedings.

The cost of the cause in the Court below will be paid as may be hereafter adjudged, on the remand.

The cost of appeal will be paid by appellants, The Winchester Normal College, principal, and S. M. Alexander, surety, and R. A. Clark, principal, and S. M. Alexander, his surety, for which let *fi. fa.* issue.

To the foregoing decree defendants except and pray an appeal to the present term of the Supreme Court, which is granted.

The written opinion and findings of fact of the Court of Chancery Appeals is filed with, attached to and made a part of the record.

Office of Clerk of the Court of Chancery Appeals for the Middle Division of the State of Tennessee.

I, Joe J. Roach, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Decree of said Court, pronounced at its September Term, 1904, in case of Trustees of Carrick Academy against R. A. Clark, *et al.*, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Court at office, in the Capital at Nashville, on this, the 20 day of November, 1905.

[Seal Court of Chancery Appeals, Nashville.]

JOE J. ROACH, *Clerk.*

37 STATE OF TENNESSEE:

Be it remembered, that at a Supreme Court of Errors and Appeals, begun and held at the Capitol, in the City of Nashville, on the first Monday in December, 1903, it being the seventh day of December, 1903; neither Judge attending, I adjourned Court until to-morrow morning at 9 o'clock.

JOE J. ROACH, *Clerk.*

The Clerk adjourned Court from day to day until Monday, December 14, 1903.

MONDAY, *December* 14, 1903.

Court met pursuant to adjournment—present, Hon. Chief Justice W. D. Beard, and Associate Justices Jno. S. Wilkes, W. K. McAlister, M. M. Neil, and Jno. K. Shields—when the following proceedings were had, to wit:

TUESDAY, *March* 22, 1904.

3, Franklin Eq.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

This cause came on to be heard upon a transcript of the record from the Chancery Court of Franklin County, the opinion and

decree of the Court of Chancery Appeals, assignments of error reply brief and argument of counsel; upon consideration whereof the Court is of opinion that the decree of the Court of Chancery Appeals is erroneous.

It is therefore ordered, adjudged and decreed by the Court of Chancery Appeals — be reversed and complainants' bill be dismissed, and that D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, as Trustees of Carrick Academy, and individually complainants, principals, and Ike W. Crabtree, Lynch & Lynch, a firm composed of J. J. Lynch and Felix D. Lynch, and Estill & Littleton, a firm composed of Floyd Estill and Jesse M. Littleton, sureties, pay all the costs of the cause, for which let execution issue.

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee.

I, Joe J. Roach, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the decree of said Court, pronounced at its December term, 1904, in case of Trustees of Carrick Academy against R. A. Clark *et al.* as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Court at office, in the Capitol at Nashville, on this, the 20 day of November, 1905.

[Seal Supreme Court, Nashville.]

JOE J. ROACH, *Clerk.*

38*a* Filed Nov. 20th, 1905. Joe J. Roach, Clerk Supreme Court of Tennessee.

Know all men by these presents: that we, D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, principals, and Floyd Estill, I. W. Crabtree, J. J. Lynch and J. M. Littleton, as sureties, are held and firmly bound unto R. A. Clark and the Winchester Normal College in the sum of one thousand dollars ($1000.00) to be paid the said obligees, their successors, representatives and assigns to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of Nov. A. D. 1905.

Whereas the above named principals and plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the cause of Trustees of Carrick Academy against R. A. Clark and others, by the Supreme Court of the State of Tennessee, on the 22nd day of March 1904.

Now, therefore, the condition of this obligation is such that if the above named principals and plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they

shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

D. S. OSBORNE,
J. K. P. CARROLL,
A. J. BARNES,
By IKE W. CRABTREE, *Att'y.*
I. W. CRABTREE.
FLOYD ESTILL.
JESSE M. LITTLETON.
J. J. LYNCH.

Signed, sealed and delivered in the presence of:
ISAAC G. PHILLIPS.
ARTHUR CROWNOVER.

I hereby approve the foregoing bond and sureties, this the 11th day of Nov. 1905.

W. D. BEARD,
Chief Justice of the Supreme Court of the State of Tennessee.

38*b* STATE OF TENNESSEE:

I, Joe J. Roach, Clerk of the Supreme Court of the State of Tennessee at Nashville, do certify that the above and foregoing is a true, complete and perfect copy of the record and proceedings in my office in the cause of Trustees of Carrick Academy *vs.* R. A. Clark *et al.*, and that the certified copies of the opinions of the Court of Chancery Appeals and of the opinion of the Supreme Court of the State of Tennessee hereto attached are true, perfect and complete copies of said opinions.

In testimony whereof I have hereunto attached my signature and affixed the Seal of office of the Supreme Court of the State of Tennessee,

This, November 22nd, 1905.

[Seal Supreme Court, Nashville.]

JOE J. ROACH,
Supreme Court Clerk.

39 Franklin Co. Equity.

TRUSTEES OF CARRICK ACADEMY
vs.
R. A. CLARK ET AL.

Filed Feb'y 6, 1904. Joe J. Roach, Clerk.

Opinion.

The bill in this case was filed January 19th, 1903, by D. S. Osborne, J. K. P. Carroll, A. J. Barnes, and G. L. Baker, suing as trustees of Carrick Academy, a body politic of Franklin County, and

in their own right, as citizens and taxpayers of said county, and for and in behalf of the school fund and school children, and the taxpayers of the county, to recover possession from the defendants of certain described property situated in the town of Winchester in said County.

There was a demurrer to the bill, which was overruled, and the defendants appealed.

This being the status of the case before us, it becomes necessary to state the substance of the bill and the demurrer thereto. The bill, in condensed form, avers:

1. That, after the admission of Tennessee into the Union in 1799, a difference arose between the former and the United States concerning the right to dispose of vacant land in the state; that North Carolina continued to issue warrants and perfect titles to lands in Tennessee, as before; that Tennessee denied the right of that state to do this; and that in 1803 the legislature of Tennessee appointed an agent to adjust and settle the difference between the two states, and that an adjustment and settlement was made, whereby
40 Tennessee was to perfect titles to lands reserved to North Carolina, by the Act of Cession, subject to the approval of the Congress of the United States.

2. That the Federal Congress gave its assent to this settlement between the two states, and entered into compact adjusting the difference between the United States and Tennessee, by an Act of Congress passed in April 1806, under the terms of which Tennessee ceded to the United States certain territory described in the Act, and the United States ceded to Tennessee the land East and North of the Congressional Line upon the following conditions:

1. That Tennessee should satisfy all North Carolina claims out of the territory ceded to it.

2. That it should appropriate 100,000 acres, located in one body, for the use of two colleges, one in East and one in Middle Tennessee.

3. That it should appropriate 100,000 acres, in one body, for the use of academies, one in each county of the state.

4. That, in issuing grants and perfecting titles, it should locate 640 acres to every 6 square miles in the territory ceded to it, where existing claims permitted, to be used in support of schools forever.

5. That the college and academy lands should not be sold for less than $2.00 per acre.

3. That at the session of the legislature in 1806, two colleges were incorporated, and at the same session academies were incorporated and established in all the counties in the state, and provision made for the incorporation of academies in new counties, as they were organized.

41 4. That the Act of Congress was confirmed at this session of the Legislature, and that the college lands were, from time to time, disposed of, in accordance with the Act of Congress, and the fund arising therefrom, used in establishing what is now known as the University of Knoxville, and the University of Nashville, and the Peabody Normal, and, in a like manner, the fund arising from a sale of academy lands, was prorated among the county academies.

5. That, by an Act of the Legislature of 1809, Carrick Academy was granted a charter, under the name of "Trustees of the Carrick Academy of the County of Franklin."

6. That, after having perfected an organization under its charter, the trustees of said academy acquired the following real estate, describing it in the town of Winchester, Franklin County, Tennessee, upon which they erected a substantial brick building, and, with its pro rata of the fund arising from the sale of academy lands, and means derived from other sources, the trustees conducted in said building a successful school for a number of years, and until the fund arising from the sale of academy lands was exhausted, the operation of the school continuing under the care of the trustees until the outbreak of the civil war between the states.

7. That, after said war, the property of the corporation was used more or less for a public school, and when not so used, was leased to individuals to be used, and was used, for private schools, until 1870, when defendant Clark, took possession of the property, and has had it ever since, using it to carry on a college, known as the Winchester Normal College, in which children are graduated, re-
42 ceive diplomas and degrees, and that said defendant operates his college as a private enterprise for profit, and although he has grown rich, as the result of the management of his college enterprise, he has never paid anything for the use of said property.

8. That, when county academies were first established, as aforesaid, their trustees, when vacancies occurred therein, were appointed and filled by the Legislature; but previous to the adoption of the Code of 1858, the law was changed, and the county courts of the several counties were authorized to elect five trustees bi-ennially; and the county court of Franklin County at its July term, 1877, elected five parties, naming them, trustees of the Carrick Academy, and May 11th, 1878, said trustees undertook to lease the buildings and grounds of the academy to J. W. Terrill, J. M. Bledsoe and defendant Clark for five years, with the privilege of renewal for ten years more. And that this pretended lease, which is of record, was probably renewed at the end of five years, and that at the end of fifteen years, and in about the year 1890, Terrill and Bledsoe withdrew from the school, and thereafter defendant Clark took charge of the property, etc., of the academy, and has since, as before stated, used it in his own interest and for his own benefit, without any shadow of right, until 1898, when the county court of the county, undertook to lease the property, etc., of the academy to the trustees of the Winchester Normal, a corporation chartered under the general laws of the state, in consideration that it keep the property insured in the sum of $6500.00.

In this paragraph of the bill it is alleged that Winchester Normal corporation has no property and never had, and that defendant Clark merely used its name and the influence of its incorporation
43 to further his private enterprise.

It is further alleged that said Clark claims to hold said property under the order of the county court, made as aforesaid at its July term 1898, and as a sub-lessee of the Winchester Normal.

9. That said order of the county court is void, because said court

has no jurisdiction of, or control over, the property of the Trustees of the Carrick Academy other than to elect bi-ennially five trustees for it, as the title to the property was conveyed to its trustees, and, under the Act incorporating the academy, the exclusive power and authority to dispose of its property was vested in them, which Act, in this respect, has never been altered or changed.

In this paragraph of the bill, it is alleged that Clark has not even kept the property in repair, which has been done by the citizens of the town and county; nor paid the insurance on it, which has been paid, in part, by popular subscriptions, and partly out of a fund raised by taxation on the taxable property of Winchester, to raise a fund for the public school taught in the town; and it is said that complainants are unable to state by what means the fund was so diverted, but that it has been for years.

10. That said property of Carrick Academy is very valuable, and its rental value, per year, while it has been in the possession of Clark, has been $1,000.00, the parcel of land embracing some five acres, carpeted with blue grass and shaded by beautiful forest trees, and the buildings thereon large and commodious.

11. That, as before stated, it was provided in the compact of 1806, that, in addition to the land set apart for colleges and academies, 640 acres to every six square miles of the territory North and East of the Congressional Line, should be appropriated for the use
44 of public schools for the education of children forever; but, that this endowment, magnificent on its face, practically failed, on account of the interference of "existing claims," and yet the fund arising from the sale of these lands formed the first fund for common schools in this state, and gave the first impetus to its public school system.

In this paragraph of the bill it is alleged, that the first public school law was pased in the state in 1823; that the state made feeble efforts to encourage public schools; that laws to this end were passed in 1829, 1837, and 1844-45, but which were little more than statutory exhortations, and were practically defective in failing to provide adequate revenue for the support of the schools; that the results of the civil war changed the whole aspect of public education in the state, that public sentiment appeared in the Act of 1873, the system of public education provided therein, being a good one, the only drawback in it being a lack of funds to keep the schools in session long enough; and it is averred that public schools in Franklin County are greatly in need of funds to lengthen their school terms.

12. That defendant through the county court, has assumed the management and control of the property of Carrick Academy without warrant of law; that this has not been done by said court in a meddlesome manner, but at the instance of Clark and his friends and advisers, and in ignorance of the rights of Carrick Academy in the premises.

13. That complainants and defendant Baker were elected trustees of Carrick Academy by the quarterly court of Franklin County at its October term 1902.

45 14. That they are the first trustees of the Academy since the election of trustees by said court in July 1877, that dur-

ing the fifteen years that Terrill, Bledsoe and Clark, had control of this property, they operated a school therein *nominally* under the supervision of the Trustees of the Winchester Normal, but these gentlemen operated the college as a private enterprise for profit, and Clark has operated since for the same purpose; and to show that the action of the county court in this matter was induced by the intervention of these parties in their own interest, it is alleged that all the trustees of Carrick Academy elected by the court in July 1877, were all members of the Board of Trustees of the Winchester Normal, and the lease to Terrill, Bledsoe and Clark was, in legal effect a lease to themselves, and Clark has, since he took charge in the name of said Normal, taken all the profits to himself.

In this paragraph of the bill it is then alleged that since the foregoing parts of the bill were drawn, complainants have discovered that Dec. 22nd, 1881, T. J. Gaines, J. L. Baugh, G. G. Phillips and W. W. Garner undertook, as Trustees of Carrick Academy, to lease its property to the Winchester Normal College for 50 years, which lease is of record, and which recites that it was made under and by virtue of the Act of the Legislature passed March 31st, 1881, authorizing the Trustees of the Academy to lease its property to the Winchester Normal College for said period. A copy of this lease is made an exhibit to the bill.

And it is charged that said lease is void and of no binding force on complainants and defendant Baker, as Trustees of the Academy, for the following reasons:

46 1. Because the then Trustees of the Academy were without authority to make said lease, without consideration.

2. Because, said Gaines, Baugh, Garner and Phillips, Trustees of the Academy, were also Trustees of the Winchester Normal.

3. Because, the Act of the Legislature is unconstitutional and void, in that, it undertook to authorize the Trustees of the Academy to appropriate its property to the use of another.

4. Because, said Act violates Sec. 28th, Article 1 of the constitution, which inhibits the taking of a person's property except by the law of the land.

5. Because, the Act violates Sec. 21, Art. 1 of the constitution, which inhibits the taking of a person's property for public use, without compensation being paid therefor.

6. Because, said Act undertakes to authorize the taking of public property for private use.

7. Because it violates Sec. 8, Art. 11 of the constitution.

8. Because it is class legislation, and prohibited by the Constitution.

The prayer of the bill is that complainants and defendant Baker be decreed to be entitled as trustees, to the possession of said property, and to a recovery of the rents of the property from Defendant Clark, from the expiration of the lease to Terrill, Bledsoe and Clark, to the present time, and to ascertain the same, that a reference be made to the master, and that the lease to the defendant college be declared null and void, and that a decree for the sale of the academy property be entered; and the rents and the proceeds of the sale of the

property be ordered to be paid into the treasury of the
47 county, for the benefit of the public school fund. The bill also prays for general relief.

The Winchester Normal College demurred to the bill on the following grounds:

1. Complainants show no sufficient ground to entitle them to the relief sought.

2. This ground is the same as the first.

3. In so far as the bill seeks to recover rents, etc., that accrued more than six years before the suit was brought, it is barred by the statute of limitations of six years.

4. No ground is shown to impeach the validity of the lease of 1881 referred to, from the Trustees of Carrick Academy to Winchester Normal College.

5. The trustees of said academy had express corporate authority to make said lease.

6. The Trustees had authority to make said lease independent of any legislative act.

7. Said lease, as is shown in the bill, was expressly authorized by the Legislature.

8. Said lease has been ratified and affirmed by long acquiescence, with full knowledge of the facts.

10. The suit, in so far as it seeks to recover possession of the real estate described, is barred, by reason of the fact, as shown by the bill, that defendant has been in the undisturbed enjoyment and quiet possession of the same for three entire years together next preceding the suit, during which time the estate of defendant has not determind.

11. In so far as a recovery of the real estate is sought, such right, if it ever existed, accrued more than 7 years before the in-
48 stitution of this suit, and, hence, is barred by the statute of limitations of 7 years.

12. No ground is shown in the bill authorizing the court to sell the property in controversy.

Defendant Clark demurred on substantially the same grounds presented by the Winchester Normal College. As before stated, these demurrers were overruled, and the defendant appealed.

They have assigned as error the action of the chancellor overruling their demurrer.

The case was argued with great ability before us, and we have been furnished with elaborate printed briefs by both sides to the litigation.

The essential questions presented by the bill and demurrers may be thus stated:

1. Did the Trustees of the Carrick Academy have the power, under the Act incorporating the Academy, to make the lease of December 22nd, 1881, for 50 years, to the Winchester Normal College, assailed in the bill?

2. If the said Trustees had the power to make a lease for this period, does the fact that it was made to said college, of which they were also Trustees, render it void?

3. Was said lease made without consideration, or for a grossly inadequate consideration, and, therefore, voidable?

4. Is the Act of the Legislature of 1881, purporting to authorize the Trustees of the Academy to lease its properties to the Winchester Normal College, constitutional, assuming that, under the charter of the academy, they did not have the power to make it?

A short résumé of certain historical facts, averred in the
49 bill, is necessary to an intelligent understanding of the questions raised.

In 1806 the Federal Government, by an Act of Congress, ceded certain territory to this state on certain conditions, which were accepted by the state, one of which conditions was, that the state should sell 100,000 acres of the land, at not less than a specific price per acre, for the maintenance of academies in the various counties of the state.

On September 13th, 1806, the Legislature of the state, in conformity to the Act of Congress, passed an Act to establish academies in the several counties of the state, and for the appointment of trustees thereof.

Acts of 1806, ch. 8.

In 1809 the Legislature passed an Act constituting William Metcalf, Jas. Hunt, Jas. Cunningham, Richard Calloway, Christopher Buller, and Geo. Taylor, a body politic and corporate, under the name of "Trustees of Carrick Academy, of the County of Franklin."

Acts of 1809, ch. 109.

Under the second section of this Act it is provided that the trustees — each of the academies aforesaid, and their successors, by the names aforesaid, shall have the same powers, prerogatives, and immunities, and be subject to the same rules, regulations and restrictions that are given to, and prescribed for, the trustees of the academies of the other counties of this state, by an Act to establish academies in the several counties of this state, and for the appointment of trustees thereof, passed September 13th, 1806.

50 The second Section of the Act of 1806 is as follows:

Sec. 2. Be it enacted, That the trustees of each of said academies, and their successors, by the names aforesaid, shall be capable in law to purchase, receive and hold, to them and their successors, forever, any lands, tenements, rents, goods, or chattels, which shall be given or devised to, or purchased by them for the use of said academies; and to sell and dispose of the same in such a manner as to them shall seem most advantageous for said academies. The said trustees by the names aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity. They shall have power, from time to time, to establish such by-laws, rules, and ordinances, not contrary to the laws and constitution of this state, as they shall judge necessary for the government of the said academies, and to appoint a president, secretary, tutors, treasurer, and other persons necessary for conducting the business of the institution. A majority of said trustees shall constitute a board to determine upon

any matter relative to the establishment, government, or support of their respective academies; but no real estate belonging to either of the said academies shall be disposed of, unless two-thirds of the trustees thereof concur in opinion thereon. Upon the death, resignation, or other legal disability of any of the said trustees hereby, or which may be hereafter appointed, the vacancy thereby occasioned shall be supplied by the next or any succeeding General Assembly, after such vacancy may occur, but may, nevertheless, be supplied by the remaining trustees, or a majority of them, until such vacancy or vacancies, shall be supplied by the Legislature as aforesaid.

51 The several Boards of Trustees shall each elect a treasurer, who shall receive all moneys accruing to the said academies, and property delivered to his care, and pay and deliver the same to the order of the said trustees, and before he enters upon the execution of the duties of his office, shall give bond and security for such sum as the board of trustees by whom he is appointed shall direct, payable to them and their successors, and conditioned for the faithful discharge of the trust reposed in him, and that he will, when required by the said trustees, render to them a true account of all moneys, goods, and chattels received by him on account of, and for the use of, the said academy; and the treasurer shall receive such salary as may be allowed and fixed by the trustees.

The third section of the Act is as follows:

SEC. 3. Be it enacted, That the said trustees shall have the power to fix on and purchase a site for their respective academies, and to take and receive subscriptions for paying for the same, as well as for the purpose of erecting and building the academy, and any other building which they may think necessary thereto, and if any person shall neglect or refuse to pay the money by him subscribed for that purpose, it shall be lawful for the said trustees to recover the same by warrant before a justice of the peace, when the subscription shall not exceed fifty dollars; and where it shall exceed that sum, by motion in the court where the delinquent subscriber resides; provided, the party has ten days' notice of such motion. And if the treasurer shall fail to render, when thereunto required, a just and true account of all moneys, goods, and chattels which have come to his hands by virtue of his office, and also all expenditures relative to the said academy, he shall, on such failure, be subject to

52 a judgment, on motion in any court of record in this state, and execution may thereupon be awarded in like manner, as against sheriffs for nonpayment of public taxes.

It appears from the averments of the bill in this case, that the trustees acquired a parcel of real estate of some five acres in the town of Winchester, Franklin County, and erected thereon a brick building, in which a school was conducted until the breaking out of the war between the states in 1861. By this time all the funds available for the support of academies in the various counties of the state, established under the Act of 1806, and subsequent Acts in accordance with the Act of Congress, *was* exhausted.

Whether the property of Carrick Academy in controversy, was

purchased with means derived from the sale of academy lands, or from donations and subscriptions of private parties, is not disclosed.

The Legislature of the state appointed the trustees of the academy established in the various counties until when it passed an Act devolving this duty upon the various county courts of the state. Who were the trustees of Carrick Academy after its first organization until in July, 1877, does not appear in the transcript of this case. At the July term 1877, of the county court of Franklin County, said court appointed B. Dufield, J. L. Baugh, W. W. Garner, T. J. Gaines, and G. G. Phillips, Trustees of the Academy. They appear to have served as trustees until complainants and defendant Baker were appointed by the county court of the county at its October term, 1902.

Gaines, Baugh, Phillips, and Garner, as trustees of the academy, December 22, 1881, leased its properties to the Winchester Normal College for 50 years. This lease purports on its face to have
53 been made under and by virtue of the authority of an Act of the Legislature passed March 30, 1881, and approved April 14, 1881.

Said Act is entitled, An Act to authorize the Trustees of Carrick Academy, to lease the Academy property to the Trustees of the Winchester Normal College, and its first section provides, that the trustees of the academy are authorized to lease its property to said college for a period not exceeding 50 years.

Its second section provides that, if the lease is made, it shall be the duty of the Trustees of said College to keep the property in good condition and free from debt, or encumberance of any kind, and that a failure to comply with these requiremnts shall render the lease null and void.

The lease also provides, in addition to the above requirements of said Act, that the Trustees of the College agree to have and put on the property "valuable improvements."

If this Act of 1881, authorizing the Trustees of the Academy, to lease its properties to the Winchester Normal College is constitutional, and the subject matter of the Act was under the control of the state, the case, in our opinion, is at end so far as the right of complainants to maintain this suit is concerned.

The determination of this question, in one of its aspects, depends upon whether academy properties, established as was Carrick Academy for defined public education purposes, belonged to, or were, or are, in legal contemplation, under the control of the state. If they were, the state had the right to dispose of the properties as it saw proper, and certainly along the line of attaining the original charter object, manifesting its purpose through Acts of its legislative departments.

54 It is quite apparent that the state has heretofore assumed that it controlled these academy properties, and had the right, through its Legislature, to dispose of them as it saw proper. As an evidence of this, the Legislature has passed Acts, some fifty or sixty in number, disposing of academy properties in various ways. The writer is very much inclined to the opinion that the state had the power to dispose of the property of this academy, or to authorize

its lease, as was done under the Act of 1881, referred to, for any legitimate educational end. I would certainly so hold if the question, as an independent one, were free from the weight of the decision of the Supreme Court of the United States in the Dartmouth College case. In that case, following its principle, we conceive that Carrick Academy was a private corporation. Dartmouth College was chartered by a grant from the King of England and was established as a college in the then Province of New Hampshire. After the Revolution the State of New Hampshire granted valuable lands to this college, and the legislature of that state afterwards undertook to change the name of the institution and to take its property and confer it upon an institution of another name. It appears that the trustees of the old college refused to accept the terms of the legislative act, the result of which was litigation between the old and the new institution, as to the property of the old. The contention of the new institution was, that the old corporation was a public corporation, and that the Legislature of New Hampshire could do as it saw proper with its property.

That eminent jurist, Chief Justice Marshall, said, speaking with reference to the college, that it was an eleemosynary corporation, and, as to its funds, a private corporation.

55 Judge Story also delivered an opinion in the case, in which he clearly draws a distinction between a public and a private corporation. It seems that the Supreme Court of the United States in that case were of the unanimous opinion, that an institution organized and chartered for educational purposes was a private corporation, and being such, was a contract between the state and the incorporators, and as such, protected by the clause in the Federal Constitution inhibiting legislation impairing the obligation of contracts. Judge Story, in that case, answering the contention that the Legislature of New Hampshire had donated large and valuable lands to the college, and, hence, that it was under the control of the state, used this language: "A private donation vested in a trustee for benefit of the general need, does not thereby become a public trust, which the Government, at its pleasure, may take from the trustee and administer in its own way. The truth is, that the Government has no power to revoke a grant, even of its own, when given to a private person, or a corporation, for special uses. It cannot recall its own endowment granted to any hospital, college, or city, or town, for the use of such corporation. The only authority remaining in the Government is judicial, to ascertain the validity of the grant, to enforce its proper uses and suppress fraud, and, if the uses are charitable, to secure their regular administration, through the means of equitable tribunals, in cases where there would otherwise be a failure of justice."

It seems to us that the principle of this case, which is sustained by numerous other authorities, settle- the law, that, although

56 Carrick Academy was incorporated by the state, and the state appointed its first trustees, and although the state may have made donations to it for the purpose of enabling it to carry out the educational ends of its creation, it was still a private corporation, and

therefore, exempt from a diversion from its original charter purposes by legislative action. We are, therefore, of opinion that it was not competent for the Legislature to authorize the Trustees of Carrick Academy to absolutely suspend its functions as a corporation, and to practically dispose of its properties to another institution, although educational but operated for private gain.

This construction is enforced by the Act of 1840, Thompson & Stegar's Revision, Section 1050, which provides that "No county academy shall be used as a college, but where there is no academy in the county, any college therein, with an academical department, may receive the funds appropriated to the county, for the exclusive use of such department."

This Act of 1840, it appears, was in force when the Act of 1881 was passed, under which the Trustees of the Academy purported to lease its properties to the Winchester College. Counsel of complainants make a point, in this connection, that the Act of 1881 is unconstitutional, in that it suspends this general law for the benefit of the Winchester Normal College, to the end, that "it may use academy property for college purposes." The Article of the Constitution said to be violated by this Act, in this respect, is Section 8, Article 11, which provides:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass
57 any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual, or individuals, rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to any member of a community, who may be able to bring himself within the provisions of such law."

In our opinion, this whole case turns upon the question of whether or not Carrick Academy was an institution, with its property, under the control of the state. If it was, it was within the power of the Legislature of the state to authorize its lease, as was done by the Act of 1881. As before stated, the court is of opinion that, notwithstanding its incorporation by the state and the appointment of its trustees by the state, until the county courts were authorized to appoint trustees thereof, it is a private corporation, created for definite public educational purposes, and that, this being so, it was not competent for the Legislature, by the Act aforesaid, to divert it from its original charter purposes, as established by the Legislature. If correct in this view, it is wholly useless to discuss the various other nice questions, constitutional and otherwise, presented in the able briefs of counsel.

Another consideration appearing in this case, makes the court slow to sanction the lease made by the trustees in this case to the Winchester Normal College. Manifestly, the duties resting upon the Trustees of Carrick Academy, were to protect its properties for the purposes for which the academy was created. Under the Act of 1881, they practically leased for fifty years, without consideration,
the trust property in their hands to a private institution
58 of which they were trustees, and this, in effect, was a surrender of the trust property in their hands to themselves, for

their private benefit. We do not believe that a court of equity should sanction this disposition of trust property by trustees.

It results, for the reason stated, that there is no error in the decree of the Chancellor overruling the demurrer, and the same is affirmed with costs: and the case will be remanded to the Chancery Court of Franklin County for answer and further proceedings.

(Signed) S. F. WILSON, *Judge.*

(The other judges concur.)

Office of Clerk of the Court of Chancery Appeals for the Middle Division of the State of Tennessee.

I, Joe J. Roach, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion of said Court, pronounced at its September Term, 1903, in case of Trustees of Carrick Academy against R. A. Clark *et al.*, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Court at office, in the Capitol at Nashville, on this, the 22 day of November 1905.

[Seal Court of Chancery Appeals, Nashville.]

JOE J. ROACH, *Clerk.*

59 *Opinion.*

Filed for Publication, March 19, 1904. Joe J. Roach, Clerk.

TRUSTEES OF CARRICK ACADEMY
vs.
B. A. CLARK ET ALS.

The present bill is filed by four out of five trustees of the Carrick Academy, a body corporate as such trustees and "in their own right as citizens and tax payers of Franklin County and for and on behalf of the school fund and of the school children as well as on behalf of the citizens and tax payers of Franklin County," against R. A. Clark and R. C. Baker (the last being the fifth trustee), and the County of Franklin and the Winchester Normal College, a duly chartered and organized corporation under the laws of Tennessee.

The purpose of the bill is to have declared void a lease made on the 22nd day of December 1881 by the then trustees of Carrick Academy of the property of the Academy to the defendant, the Winchester Normal College, for the period of fifty years; to recover rent for this property from the defendant Clark upon the ground that under this lease he has had the use of the property, and also for the purpose of obtaining a decree for the sale of the property so that the proceeds thereof may be put into the treasury of Franklin County "for the benefit of the school fund."

The bill avers that the trustees who undertook to make this lease assumed to act under the authority of Ch. 76 of the Acts of the Legislature of 1881. This Act is as follows: "An Act to authorize the Trustees of Carrick Academy to lease the Academy prop-
60 erty to the trustees of the Winchester Normal College.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That the trustees of Carrick Academy are hereby authorized to lease the Academy property to the Trustees of the Winchester Normal College for a period not exceeding fifty years.

SECTION 2. Be it further enacted, That if the lease is made it shall be the duty of the Trustees of said college to keep the property in good condition and free from all debt, or incumbrances of any kind and a failure to comply with these requirements shall render the lease null and void."

A copy of the lease executed in accordance with the provisions of this Act is made an Exhibit to the bill and upon examination it is found that in its provisions it conforms to the requirements of the Act in every respect. So that in general terms it may be said that if the Legislature had the right to pass this Act there has been a proper execution of the authority conferred therein.

The complainants, however, as has been said, impeach this lease and rest their right to relief on four grounds which are thus stated in the brief submitted by this counsel;

1st. "That the lease complained of was void and of no effect because there was no consideration for the contract.

2nd. That all of the Trustees of Carrick Academy who signed and executed the lease contract were also trustees of the lessee, the Winchester Normal College.

3rd. That a corporation can not transfer property held by it in trust if the conveyance would be in violation of the rights of the beneficiary.

4th. That Chapter 76 of the Acts of 1881 which undertook to authorize the Trustees of Carrick County to lease to the Winchester Normal College the property of the Academy is unconstitutional and void."

61 To a proper understanding of the conclusion reached by us a short resume of the conditions that led to the creation of the corporation presented by complainants as well as of the Act so creating it and of the course of legislation dealing with institutions of its class, is essential. This resume, in so far as it is historic in character, while a matter of common knowledge, is, for the purpose of this opinion, taken from the bill of complainants.

It is therein averred that "after the admission of the State of Tennessee to the Union and in 1799 a dispute arose between the State and the United States as to which had the right to dispose of the vacant and unappropriated lands in the State. In the meantime the State of North Carolina continued to issue warrants and perfect titles to lands in Tennessee in the same manner as if no cession had been made.

Tennessee denied the right of the State of North Carolina to do this. In 1803 the Legislature of Tennessee appointed an agent for

the purpose of settling the difference between North Carolina and Tennessee by friendly adjustment. The negotiation between this agent and the representative of North Carolina resulted in agreement by which the State of Tennessee was atuhorized to perfect titles to lands reserved to North Carolina by the Act of cession, subject to the assent of Congress.

Congress gave its assent to the agreement between the two states and entered into a compact settling the controversy between the United States and Tennessee by an act approved April 18, 1806. Under the terms of this compact the State of Tennessee ceded to the United States certain territory described under the Act. The United States ceded to Tennessee the lands East and North of the Congressional line, subject to the following conditions:

62 1st. That Tennessee should satisfy all North Carolina land claims out of the territory ceded to it;

2nd. It should appropriate 100,000 acres to be located in one entire tract for the use of two colleges, one in east and one in west (middle) Tennessee.

3rd. It should appropriate 100,000 acres in one entire tract for the use of academies, one in each county of the State;

4th. It should in issuing grants and perfecting titles allow 640 acres to every six square miles in the territory ceded to it where existing claims would allow the same, which should be appropriated for the use of schools forever;

5th. That the college and academy lands should not be sold for less than two dollars per acre."

It is thus seen that at this early day the Congress of the United States out of the splendid domain ceded to the State provided munificently for public education, and it may be said that if the State had acted as a wise trustee in the management and appropriation of the property set apart for this purpose, the most beneficient results might have resulted therefrom to the citizens of the State. That the condition imposed by this cession act was accepted by the State in good faith is apparent from the legislation that immediately ensued. For the purpose of carrying out the policy to promote education in the State in accordance with this condition, two colleges were incorporated and established, and on the 13th of September, 1806, the Legislature at the same session passed an Act entitled "An Act to establish academies in several counties of this State, and for the appointment of trustees thereof." By this Act 27 academies were incorporated, one for each of the then existing counties of the State. As a sample of the incorporating clauses as found in this Act, we give that contained in the first sentence of the first section, which is in these words;

"SECTION 1. Be it enacted by the General Assembly of the

63 State of Tennessee that Daniel Perkins, Chapman White and Abraham Maury Sr. shall be and they are hereby created a body politic and corporate to be known by the name of The Trustees of Harpeth Academy in the County of Williamson."

By the terms found in other sections of the act the trustees were empowered to acquire and dispose of property as "might seem to

them most advantageous for the said academies. To sue and to be sued and to establish by laws, rules and ordinances not contrary to the laws and constitution of the State as they shall deem necessary for the good government of the academies." It is further provided that "upon the death, resignation or other legal disability of any said trustees hereby or which may be hereafter appointed the vacancy thereby occasioned shall be supplied by the next or any succeeding General Assembly after such vacancy may occur." Vol. 1, page 931, Scott's Ed. Laws of Tennessee.

Afterwards the Legislature at its session in 1809 passed an act incorporating with others "the trustees of Carrick Academy" which is in these words: Be it enacted by the General Assembly of the State of Tennessee, That * * * Wm. Meckliff, Jas. Hunt, Jas. Cunningham, Richard Colburn, Christopher Butler and George Taylor shall be and they are hereby constituted a body politic and corporate to be known by the name of the trustees of Carrick Academy of the County of Franklin. * * *

SECTION 2. Be it enacted that the trustees of each of the academies aforesaid and their successors by the name aforesaid shall have the same powers, prerogatives and immunities and be subject to the same rules, regulations and restrictions that are given to and prescribed for the trustees of the academies of the other counties of this State by the act to establish academies in the several counties of this State and for the appointment of trustees thereof passed September 13, 1806."

64 This Act is Chap. 109 of the Acts of 1809, Vol. 1, Scott's Edition, Laws of Tennessee page 1198. The bill of complainants alleges that the College lands were disposed of from time to time agreeable to the Act of Congress * * * and the funds arising from the sales were applied to the building, equipment and recontinuance of two colleges * * * and in like manner the fund arising from sale of the Academy lands were prorated among the academies as contemplated by the act of Congress and the Legislature of Tennessee.

It will thus be seen that in the strictest sense by its donation the State was the "founder" of these corporations and they were created without share-holders or named beneficiaries. There is certainly nothing in the act of incorporation which gives to the tax payers of the respective counties in which these academies were located any right in their administration while going or to the proceeds of the sale of their properties upon their demise. And this is equally true as to the school children of the several counties. While these academies were established by the State as training schools for the children of these counties, they are not either expressly or by necessary implication made *cestui que trust.*

What then were these corporations? We have no doubt that the Legislature creating them supposed them to be, as well as subsequent Legislatures in dealing with them, assumed, they were mere educational agencies of the State to accomplish the design foreshadowed by the condition in the cession agreement already referred to. The history of the Legislat*ives* with regard to them shows this clearly.

The Legislature in the original act reserved to itself the
65 right to elect trustees from time to time and to fill all vacancies occurring in the persons of the trustees and it exercised this right until by an act passed in 1816 it developed this duty on the several County Courts of the State. This Act is Chap. 137 and is found on page 393 of the Second Vol. of Scott's Ed. of the laws of Tennessee.

As further illustrating the control which the Legislature exercised over these institutions we refer to an act passed during the session of the Legislature when the trustees of Carrick Academy were incorporated and only eight days thereafter, this being Chap. 52 and found on page 1160 of Scott's Ed. which is in words and figures following:

"First." Be it enacted by the General Assembly of the State of Tennessee, That from and after the passage of this act no student shall be expelled from any or either of the * * * academies in this State unless two-thirds of the trustees which have been or may hereafter be appointed to superintend said institutions may be present at the time of said expulsion, any law to the contrary notwithstanding.

"Second." Be it enacted that no student shall be suspended from the priviliges he may be entitled to as much in any * * * academy in this State except there be one half of the trustees of such institution present and that a majority of the trustees so present shall vote for such suspension." And, again, at the session of the Legislature in 1817 an act was passed by the fourth section of which four additional trustees were appointed to Carrick Academy. So far as can be seen from the Act it is without consultation with or consent of the trustees already appointed and exercising authority.

So it will be observed that the Legislature not only in-
66 creased at its pleasure the number of trustees of Carrick Academy but that it undertook to regulate the internal discipline of all the academies created by these various acts. So if there be anything in contemporaneous construction or implied legislative exposition it may be asserted with great confidence that these academies were public institutions and regarded as such from their creation.

In fact so absolute has been the assertion of this right of legislative control that we find at least 56 acts passed at different times directing the sale, exchange or lease of the properties of the several academies chartered as was this, under the authority of which much corporate property has changed hands and so far as we are advised this is the first case in which the right of the legislature to pass such acts has been called in question.

The predicate upon which the complainants rest their attack upon the act authorizing the lease to the Winchester Normal College is that Carrick Academy was a private corporation created to administer a trust for the benefit of the tax-payers and school children of Franklin County.

In order to determine whether this assumption is sound it is necessary to ascertain briefly the nature of corporations. While it is

true there may be a corporation sole, yet the law has ordinarily to deal with the corporation aggregate, which is a collection of a few or many individuals united in a single body under a special name endowed with the capacity of acting as one person. Such a creature is purely artificial, existing only in contemplation of law and can neither employ its franchises nor hold its property for its own benefit. Such a corporation may be considered as a body of individuals having collectively faculties and capacities which they can employ for their own benefit or for the benefit of others, according to the pur-
67 poses for which these faculties and capacities which they can employ for their own benefit or for the benefit of others, according to the purposes for which these faculties and capacities were bestowed. It is apparent that all beneficial interest both in the franchises and the property of corporations must be considered, when these corporations are reduced to their last analysis, as vested in natural persons, either in the people at large or in individuals. It is in this view, that they are divided into public and private corporations.

Private corporations are those created for the immediate benefit and advantage of the individuals constituting them and the franchises conferred are to be exercised for their advantage. The corporation stands to them in the relation of trustee holding the property owned by it for and dividing the profits arising from its management, and the employment of its franchises, for these individuals as *cestuis que trust*. Upon the other hand, public corporations are created for public purposes and the property controlled by them is devoted to the objects for which they are created.

The corporators have no private beneficial interest either in the franchises granted or the property controlled. The only private right which an individual can have in such a corporation is the right of being and acting as a corporator. So far as the property of the corporation is concerned the interest which the corporators have as individuals is that common interest which all citizens have in property belonging to the State. Nor is the character of this interest affected by the source from which the property comes. A purchase by or a gift of property to the corporation is in reality a purchase by or a gift to the public and is to be administered by the corporation as an agency of the State.

These distinguishing features, as well as the rules for the government of these two classes of corporations are announced in
68 the standard text books, and in many reported cases, which it is unnecessary to cite.

These being the distinctive marks of private and public corporations, we think there is no difficulty in assigning the corporation in question to its proper place among the latter.

As has been seen it had no share-holders and earned no profits in which its corporators had an interest. It was evidently organized for a public purpose. It was purely one of the educational agencies of the State created for the diffusion of knowledge in the various communities where located. The legislation out of which sprang this and the other academies of like nature, however, crude, was

the first effort of the State to bring education to the door and within the means of every citizen of the commonwealth. It was the beginning of a long series of efforts which were often abortive but as often renewed to establish a public school system in the State, and that which we have today can be historically traced to the initial acts of 1806 and 1809.

Being public agencies established by the State to subserve a public purpose, we see no more reason to doubt the power of the legislature to pass the act in question than to enact legislation to create and destroy municipalities and to exercise control at its pleasure over the various benevolent institutions and their properties established throughout the State.

This is no new question in this State. In 1836 the Legislature created a body, politic and corporate by the name and style of the "Board of Commissioners of Common Schools" and authorized it to "hold and possess property of any kind in trust for the use of the common schools" and to "do and execute all acts which a corporation or body politic in law" could "lawfully do and execute." A controversy subsequently arose between the corporation and one McEwen, the Superintendant of public instruction and who
69 as an officer of the board had charge of its funds and the sureties on his bond alleged maladministration of his trust. While this controversy was pending, the General Assembly adopted a resolution by which a commission was provided with authority to compromise and settle with the sureties of McEwen who were sought to be held liable for his alleged mismanagement "upon principles of right and justice and to the best interest of the school fund." A compromise agreement was made and submitted to the Courts when the controversy was pending and it was there combatted by the counsel representing the board upon the ground urged by complainants in the present case that this legislative act was unconstitutional interference with the franchises conferred by the act of incorporation, upon the board. This insistence, however, was not sustained, the Court holding in express terms that the corporation in question was a public agency and as such under the control of the legislature. Speaking through Judge Turley, the Court said: "Such public corporations are made for public convenience. No private rights are involved in them and therefore the legislature in interfering with them is in no danger of violating the obligations of contract or public faith and although it may have thought proper to delegate a portion of its own legitimate power to such corporation for the public benefit, yet the same may be renewed at any time and exercised temporarily by the legislature at its discretion or the corporation may at any moment be deprived of it altogether. The Governor *vs.* McEwen, 5 Humphreys, 241.

If this holding needed support it is to be found abundantly in the opinions of courts of last resort outside of this State. In 1826 the legislature of Alabama created a corporation known as the "Mobile School Commissioners." The funds of this corporation were to be

derived wholly from the bounties of the State and the United
70 States and from certain revenues accruing to the treasury of the county fine, forfeiture, etc., "all of which were set apart as a fund, not for the benefit of the Commissioners but as a special fund for the endowment and support of schools in said County."

Of this corporation, in Mobile School Commissioners *vs.* Putnam, 44 Ala. 506 the Court said: "There was neither stock nor shareholders nor was any consideration payed by them, nor by any other person for the charter of incorporation, if such it can be properly called; it was wholly a matter of public concern and for public benefit and consequently nothing in the nature of a contract was created between the State and said Commissioners or the people of the State and county of Mobile, either as a body corporate or as individuals. It was and was intended to be in all its essential characteristics and attributes a public institution or corporation created for public purposes and therefore, subject to be altered, amended or even repealed by the legislature." The same view was announced in Trustees of the University of Alabama *vs.* Winstead, 5 Stewart & Porter, (Ala.) 170 in these words: "If the property possessed by a corporation is altogether the property of the State; if the corporation have paid nothing amounting to a valuable consideration for the act of incorporation; in fine, if there is no contract upon valuable consideration between the States and the corporators it is a public corporation and if it is public it is certainly within the complete control of the General Assembly."

In Heard *vs.* Curators of Missouri, 47 Mo., 224, it appears that the University of Missouri was established by the State. Private citizens of Boon County in order to secure its location subscribed $108,000 for its use and an institution known as Columbia College gave to it its building apparatus valued at ten thousand dollars ($10,000).

The Supreme Court of Missouri, with reference to the legal
71 status of that university, said: "But these contributions to the building fund did not constitute the contributors founders of the University. Nor did the contributions alter the nature of the foundation or change the character of the corporation. (University of N. C. *vs.* Moultsly, 8 Ired. 257). Between this and the Dartmouth College case and the case following that decision there is a broad distinction, viz: the difference that exists between the public institution of the state and a private corporation. The state entered into no compact with private parties. The state established an institution of its own and provided for its control and government through its own agents and bounties. The act creating the institution in its first section declares that a university is hereby instituted in this state, the government whereof shall be vested in a board of curators. The university is then declared a corporation and body politic and vested with certain powers. These powers are given into the hands of a board which was made subject to the pleasure of the legislature. This is not the way in which a private corporation is brought into being and indebted with corporate franchises. A private corporation involves the idea of private parties and private rights. No such parties or rights were discerned in the institution of the Uni-

versity of Missouri. By establishing the University the State created an agency of its own through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes, a State University." To like effect is State of Florida *Ex Rel. vs.* Knowles, 16 Fla. 577.

The Court of Chancery Appeals adopted the view insisted upon by the complainants and rested their conclusion upon the authority of the case of the Trustees of Dartmouth College *vs.* Woodward, 4 Wheaton, 519. We think, however, that Court misapplied that case as an examination of the opinion of the Court, delivered
72 by Chief Justice Marshall, will disclose. In that opinion it was distinctly conceded that if the corporation there in question was a political agency then it was subject to legislative control and no complaint could be made of the act of the legislature of New Hampshire which undertook to make material changes in the organization and methods of the institution. The Court, however, found that Dr. Wheelock who was treated as a founder of Dartmouth College "acting for himself and for those who at his solicitation had made contributions to his school applied for this charter as the instrument which should enable him and them to perpetuate their beneficiant intention. It was granted and an artificial immortal being was created by the crown capable of receiving and distributing forever according to the will of the donors the donations which should be made to it. On this being the contributions which had been collected were immediately bestowed. These gifts were made not in deed to make a profit for the donors or their posterity but for something in their opinion of inestimable value; for something which they seemed to think fully equivalent for the money with which it was purchased; the consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves." Upon these facts it was held that Dartmouth College was a private eleemosynary corporation and that its charter was "plainly a contract to which the donors, the trustees and crown (whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration; it is a contract for the security and disposition of property; it is a contract on the faith of which real and personal estate has been conveyed to the corporation; it is then a contract within the letter of the constitution." * * *

It is easy to see that the corporation styled the "Trustees of Carrick Academy" finds no analogy to the one that was the subject of
73 consideration in that case. So it is, upon principle as well as upon authority, we hold that this corporation was a public agency under the control of the State and that the Act of the Legislature under which the lease of its property to the Winchester Normal College was made in 1881 was constitutional. This holding relieves us from considering the minor objections made to the lease by the complainants in their bill. It follows that the Court of Chancery Appeals holding otherwise was in error and its decree is reversed and the bill of complainants is dismissed at their cost.

BEARD,
Chief Justice.

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee.

I, Joe J. Roach, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion of said Court, pronounced at its December term, 1903, in case of Trustees Carrick Academy against R. A. Clark *et al.* as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Court at office, in the Capitol at Nashville, on this, the 22 day of November, 1905.

[Seal Supreme Court, Nashville.]

JOE J. ROACH, *Clerk.*

74 *Bill of Cost.*

Clerk, J. J. Roach.

Filing petition .50; filing writ of error .50; filing copy of citation .50; filing bond .50; transcript, opinions & decrees 18675 words at 15 cts. 100 words $28.00; 4 certificates $2.00; total $32.00.

Endorsed on cover: File No. 20,009. Tennessee supreme court Term No. 159. D. S. Osborne, J. K. P. Carroll, A. J. Barnes, and G. L. Baker, Suing as Trustees of Carrick Academy of the County of Franklin, &c., plaintiffs in error, *vs.* R. A. Clark and Winchester Normal College. Filed December 8th, 1905. File No. 20,009.

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No. 159.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

D. S. OSBORNE ET AL., TRUSTEES OF CARRICK ACADEMY, PLAINTIFFS IN ERROR,

vs.

R. A. CLARK AND WINCHESTER NORMAL COLLEGE, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

ASSIGNMENT OF ERROR, BRIEF, AND ARGUMENT FOR PLAINTIFFS IN ERROR.

No. 159.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

D. S. OSBORNE ET AL., TRUSTEES OF CARRICK ACADEMY,
Plaintiffs in Error,

vs.

R. A. CLARK ET AL.,
Defendants in Error.

In Error to the Supreme Court of Tennessee.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

May it please the Court:

This cause is here on writ of error to the Supreme Court of Tennessee.

The original bill in this cause was filed in the Chancery Court of Franklin County, Tennessee, by the plaintiffs in error D. S. Osborne and others as trustees of Carrick Academy.

The object of the bill was to have annulled a lease of the property of said Carrick Academy, consisting of school buildings and real estate situated in Winchester, Tennessee, which lease had been executed to the defendant Winchester Normal College by virtue of an act of the General Assembly of th State of Tennessee passed in the year 1881 authorizing said lease.

The question is, whether or not, the legislature of Tennessee ha dauthority to authorize the execution of the lease complained of.

On April 18, 1806, the President of the United States approved an act of the Congress which ceded to the State of Tennessee certain public lands situated within the boundaries of the said State. Certain conditions were attached to this cession, the second of which was that the State of Tennessee should appropriate one hundred thousand acres of said land for the use of two colleges. On in East Tennessee, and one in West Tennessee (now Middle Tennessee) to be established by the legislature of the State, and—

"One hundred thousand acres in one tract within the limits last aforesaid for the use of academies, one in each county, in said State to be established by the legislature thereof; said several tracts shall be located on lands to which the Indian title has been extinguished; and subject to the disposition of the legislature of the State. But shall not be granted or sold for less than $2.00 per acre, and the proceeds of the sales of the lands aforesaid shall be invested in funds for the respective uses aforesaid forever."

This cession was ratified and accepted by an act of the legislature of Tennessee, passed and approved on September 6, 1806.

Scott's Laws of Tennessee, pp. 936-939.

For the convenience of the court this act is attached as an appendix to this brief.

On September 13, 1806, the General Assembly of the State passed an act incorporating academies and appointing trustees therefor, in all of the existing counties of the State.

After setting out the names of the various academies and the trustees appointed, said charter provides as follows:

"2. Be it enacted, That the trustees of each of said academies, and their successors, by the names aforesaid, shall be capable in law, to purchase, receive, and hold to them and their successors forever, any lands, tenements, rents, goods or chattels, which shall be given or devised to, or purchased by, them for the said academies.

The said trustees by the names aforesaid, may sue and be sued, plead and be impleaded in any court of law or equity; they shall have power from time to time to establish such by-laws, rules and ordinances, not contrary to the laws and constitution of this State, as they shall judge necessary for the good government of the

said academies, and to appoint a president, secretary, tutors, treasurer, and other persons necessary for conducting the business of the institution. A majority of said trustees shall constitute a board to determine upon any matter relative to the establishment, government, or support of their respective academies; but no real estate belonging to either of the said academies shall be disposed of, unless two-thirds of the trustees thereof concur in opinion thereon. Upon the death, resignation, or other legal disability of any of the said trustees, hereby, or which may hereafter be appointed, the vacancy thereby occasioned shall be supplied by the next, or any succeeding General Assembly after such vacancy may occur; but may, nevertheless, be supplied by the remaining trustees, or a majority of them, until such vacancy, or vacancies shall be supplied by the legislature as aforesaid.

The several boards of trustees shall each elect a treasurer, who shall receive all monies accruing to the said academies, and property delivered to his care, and pay and deliver the same to the order of the said trustees; and before he enters on the execution of the duties of his office, shall give bond and security for such sum as the board of trustees by whom he is appointed shall direct, payable to them and their successors, and conditioned for the faithful discharge of the trust reposed in him, and that he will, when required by the said trustees, render to them a true account of all monies, goods and chattels received by him on account of, and for the use of said academy; and the treasurer shall receive such salary as may be allowed and fixed by the trustees.

3. Be it enacted, That the said trustees shall have power to fix on and purchase a site for their respective academies, and to take and receive subscriptions for paying for the same as well as for the purpose of erecting and building thereto; and if any person shall neglect or refuse to pay the money by him subscribed for that purpose, it shall be lawful for the said trustees to recover the same by warrant before a justice of the peace, where the subscription shall not exceed fifty dollars; and where it shall exceed that sum, by motion in the court where the delinquent subscriber resides: Provided, the party has ten days previous notice of such motion; and if the treasurer shall fail to render, when thereunto required, a just and true account of all monies, goods and chattels, which have come to his hands by virtue of his office, and also all expenditures relatives to the said academy, he shall on such failure, be subject to a judgment on motion, in any court of record in this State, and executions may thereupon be awarded in like manner as against sheriffs for the non-payment of public taxes.

4. Be it enacted, That the legislature may from time to time, at periods not less than two years distant from each other, appoint two additional trustees to each board: Provided, the number of trustees for any of the aforesaid academies, shall never exceed thirteen.

5. Be it enacted, That until a president shall be elected for each of the said academies, and shall have entered upon the duties of his office; and also, in all cases of a vacancy, or the absence of the president, the said trustees shall appoint one of their members to preside in their meetings, and all the doings and acts of the trustees, while acting under such circumstances, shall be considered in law as the doings and acts of the board, as fully and completely as when the president of the academy shall be in office and preside.

6. Be it enacted, That it shall be the duty of the first person named as trustees for each academy by this act established, to fix the time for holding the first meeting of said board, which shall be at the court house of the county where such academy is established, or at the place of holding court for said county, of which he shall give notice in writing to each member, at least tendays previous to such meeting.

7. Be it enacted, That this act shall be deemed a public act, and as such shall be judicially taken notice of without special pleading, in all the courts of law and equity within this State."

Scott's Laws of Tennessee, vol: 1, 934-936.

Afterwards the General Assembly of Tennessee at its session of 1809, passed an act incorporating with others, the "Trustees of Carrick Academy" in the following words:

"Be it enacted, By the General Assembly of the State of Tennessee, that William Meckliff, Jas. Hunt, Jas. Cunningham, Richard Colburn, Christopher Butler, and George Taylor shall be and they are hereby constituted a body politic and corporate to be known by the name of the trustees of Carrick Academy of the County of Franklin.

Sec. 2. Be it enacted that the trustees of each of the academies aforesaid and their successors by the name aforesaid, shall have the same powers, prerogatives and immunities and be subject to the same rules, regulations and restrictions that are given to and prescribed for the trustees of the academies of the other counties of this State by the act to establish academies in the several coun-

ties of this State and for the appointment of trustees thereof, passed September 13, 1806."

Chapter 109 of the acts of 1809, vol. 1, Scott's Laws of Tennessee, p. 1198.

On November 18, 1817, the General Assembly passed an act authorizing the county courts of the various counties to appoint trustees for the academies situated therein when a vacancy should occur on account of death, resignation, or removal.

Vol. 2, Scott's Laws of Tennessee, p. 393.

The bill in this cause alleged that after the incorporation of the trustees of Carrick Academy as herein before recited, the trustees named in the charter accepted the trust, and thereafter acquired a certain tract of land situated in the town of Winchester, Franklin County, Tenn., the description of which is given in the bill, upon which it is alleged in the bill, said trustees erected a substantial brick building, and with its pro rata of the funds arising from the sale of the academy lands, and means received from other sources, the trustees conducted in said building a successful school for a period of years and until the fund arising from the sale of academy lands was exhausted, the operation of the academy under the direction of its trustees continued up to the breaking out of the war between the States."

The bill alleged that after the Civil War, the property was used for some time for public schools, and when not so used, it was leased to individuals to be used and was used for private schools until 1870, when it was taken possession of by the defendant, R. A. Clark, who used the property without any right, or title in running a school called Winchester Normal College.

In 1881 the General Assembly of Tennessee passed the following act. (Acts of General Assembly of Tennessee, 1881, chapter 63, p. 76).

"An act to authorize the trustees of Carrick Academy to lease the academy property to the trustees of the Winchester Normal College.

Section 1. Be it enacted by the General Assembly of the State of Tennessee that the trustees of Carrick Academy are hereby authorized to lease the academy property to the trustees of the Winchester Normal College for a period not exceeding fifty years.

Sec. 2. Be it further enacted, that if the lease is made it shall be the duty of the trustees of said college to keep the property in good condition and free from all debt or incumbrance of any kind, and a failure to comply with these requirements shall render the lease null and void."

Pursuant to this act, the trustees of Carrick Academy executed the following lease contract:

"Whereas the undersigned (John Simmons), J. L. Baugh, G. G. Phillips, T. J. Gaines and W. W. Garner are the trustees of Carrick Academy, a corporation incorporated by the legislature of Tennessee, and whereas, the legislature passed March 30, 1881, and approved 14th of April, 1881, an act providing as follows: "That the trustees of Carrick Academy are hereby authorized to lease the academy property to the Winchester Normal College for a period not exceeding fifty years; that if the lease is made it shall be the duty of the trustees of the said college to keep the property in good condition, and free from debt or incumbrance of any kind, and a failure to comply with these requirements shall render the lease null and void," and whereas, the Winchester Normal College is a corporation incorporated under the laws of the State of Tennessee, and the trustees thereof are as follows: B. Dufield, T. J. Gaines, W. W. Garner, G. G. Phillips, J. K. Bennett, W. H. Brannan, J. L. Baugh, J. M. Anderson, J. Kasserman, John Simmons, A. S. Marks, H. R. Moore, Henry Finch, William Taylor, W. B. Gray, Jas. H. Davis, H. G. Hampton, C. C. Estill, Jas. H. Holman, J. B. Fitzpatrick, S. D. Mather; and whereas, the board of trustees of the Winchester Normal College by resolution have agreed to accept the lease provided for in said act upon the terms and conditions prescribed therein; and whereas, by a lease existing when said act was passed to J. W. Terrill, R. A. Clark and J. M. Bledsoe, were entitled to the property until the 10th day of May, 1893; now, therefore, in consideration of these premises aforesaid and for the further consideration that the said Winchester Normal College and the trustees thereof agreed to have and put on said property valuable improvements, and have agreed to comply with the requirements of said act, we, the undersigned as trustees of Carrick Academy, and in persuance of the power vested in us by said act, do hereby lease to the trustees of the Winchester Normal College, for a period of fifty years the academy property belonging to Carrick Academy, and consisting of a lot situated within the corporate limits of Winchester, containing about five acres, more or less, bounded on one side by Jefferson street, on another by a lot of Wm.

McNabb, on another by lot of Jas. M. Russey, and on another by a street between herein conveyed and the property on Miss Julia Curl and Miss Susan Bethel, together with all the improvements hereon, and *it is intended that this lease shall be as full and effective as is authorized by said act, but no further or otherwise.*

This 22nd day of December, 1881.

Witnesses to W. W. Garner's signature:

M. P. Hines, S. W. Houghton, T. J. Gaines, J. L. Baugh, G. G. Phillips, W. W. Garner."

R. pp. 14-15.

It was to annul this lease that the bill was filed.

The bill alleged that the Winchester Normal College was but a conduit through which it was intended for the property to pass, and through which it did pass immediately into the hands of the defendant, R. A. Clark. It was charged that the said R. A. Clark went into the possession of this property which was thus diverted from the uses and purposes contemplated by its charter, by the United States government in the act referred to, and by those who had contributed to the institution, and that the property had from that time until the filing of the bill, been used and operated by said R. A. Clark in running a private school for his own use. It was charged that he had in no manner used the property for the benefit of those for whose use the corporation was created and the academy endowed, but on the contrary the said defendant had grown rich in thus using the property for his own private benefit.

The bill sought to recover the property and to recover rents, and if necessary to have the property sold and the rents and proceeds applied under the orders and decrees of the court to the education of the children of Franklin County, as contemplated by the founders of the institution.

The bill attacked the validity of the act of 1881 authorizing this lease, upon various grounds, but so far as the jurisdiction of this court is concerned, the substance of the objection to the act was that the General Assembly of Tennessee had no authority to authorize the taking of the property of this corporation for the private use of another. The defendant demurred to the bill, assigning several causes of demurrer. R., pp. 16-17.

But the real question involved was whether the trustees of Carrick Academy was a public corporation which the State of Tennessee, through its General Assembly, had a right to control, whose existence it had a right to terminate, and whose property it had a right to dispose of at will.

The Chancellor overruled the demurrers and sustained the bill.

Rec. p. 18.

The court of Chancery Appeals also overruled the demurrers and held that Carrick Academy was a private corporation and that under the principles of the Dartmouth College case (4 Wheaton, 518) the General Assembly of Tennessee had no authority to authorize the diversion of this fund from the corporation to which it had been conveyed and from the purposes contemplated by its charter and its founders. R. pp. 24-35.

The Supreme Court of the State on appeal reversed this holding, sustained the demurrers, and dismissed the bill.

That Court held that the act incorporating the trustees of Carrick Academy was not a contract and did not create a private corporation but a public corporation, subject to the absolute control of the legislature of the State, and hence it had a right to authorize the lease, or conveyance of the property as it did in the act of 1881 complained of. R. pp. 35-43.

ASSIGNMENT OF ERRORS.

Complainants have assigned errors in this Court as follows:

R. pp. 3-5.

I.

That said Court erred in finding and decreeing that the said complainants were not entitled to the relief sought in and by their bill ,and in denying them such relief and dismissing their said bill with costs.

II.

That the Supreme Court erred in finding and adjuding that Carrick Academy, of the County of Franklin, incorporated by the Legislature of the State of Tennessee, was a mere educational agency of the State, and was a public corporation under the control of the Legislature, and that Chapter sixty-three of the Acts of the General Assembly of 1881, authorizing the Trustees of said Academy to lease the Academy property to the Trustees of the Winchester Normal College is valid and constitutional; and that the

lease contract made by the Trustees of said Academy to the Trustees of said College, under the authority of said Act of 1881, was valid and binding on said Academy corporation.

III.

Because the Court did not find and adjudge that Carrick Academy, of the County of Franklin, is a private corporation, and its charter the declaration of a trust and a contract, and that the Act of the General Assembly of the State of Tennessee, being Chapter sixty-three of the Acts of 1881, entitled: "An Act to authorize the Trustees of Carrick Academy to lease the Academy property to the Winchester Normal College," was in violation of the contract clause of the Federal Constitution, and diverted the trust fund that said Academy corporation was chartered to administer, and repugnant to section 11 of the Act of Congress approved April 18th, 1806, entitled: "An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;" and impaired the contract to which the donors, trustees of said Academy corporation, the beneficiaries and the State were parties; and that the lease contract made under the authority of said Act of 1881 was null and void.

IV.

That in the Chancery Court held at Winchester, in Franklin County, Tennessee, being the Court which had and exercised original jurisdiction of said cause, said several complainants being the plaintiffs in error herein, suing as aforesaid, specifically set up and claimed that Carrick Academy, of the County of Franklin, was organized under the laws of the State of Tennessee to administer a trust, and that its charter was the declaration of a trust, and a contract to which the donors, the Trustees, the beneficiaries and the State were parties; that the act of he General Assembly of said State passed March 30, 1881, and approved April 14th, 1881, entitled. "An Act to authorize the Trustees of Carrick Academy to lease the Academy property to the Trustees of the Winchester Normal College," being Chapter sixtey-three of the Acts of 1881, was unconstitutional and void, because it impaired the obligation of said contract and was repugnant to Section X, Article I of the Constitution of the United States, and in contravention of Section 2 of the Act of Congress approved April 18th, 1806, entitled: "An Act to authorize the State of Tennessee to issue grants to per-

fect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same"; and complainants being plaintiffs in error herein, questioned the validity of the authority of the Trustees of said Academy, exercised under said Act upon the ground of its being repugnant to the Constitution of the Uniter States, and in contravention of Section 2 of said Act of Congress; and the decision of the said Chancery Court at Winchester, in Franklin County, Tennessee, was against the validity of said Statute and the authority exercsed thereunder, so far as it affected complainants, and in favor of the immunity claimed by emoplainants; but upon appeal to the said Supreme Court of the State of Tennessee, the decision of the Supreme Court was in favor of the validity of said Statute, and the authority exervised thereunder, and against the privilege and immunity and right claimed by the said complainants under the said Constitution and laws of the United States, and particularly under the contract clause of said Constitution, and the Act of Congress aforesaid; and said complainants say that the said Supreme Court erred in deciding in favor of the validity of said Statute of the State of Tennessee, and of the authorty exercised thereunder, and against the rights, privileges and immunities set up and claimed by said complainants, under aforesaid provision of the Constitution of the United States, and the Act of Congress aforesaid.

ARGUMENT FOR THE COMPLAINANTS.

In delvering the opinion of the Supreme Court of Tennessee ni this cause, the learned Chief Justice, discussing the distinction between private and public corporations, said:

"It is apparent that all beneficial interests both in the franchises and the property of corporations must be considered, when these corporations are reduced to their last analysis, as vested in natural persons—either in the people at large or in individuals. It is in this view that they are divided into public and private corporations.

"Private corporations are those created for the immediate benefit and advantages of the individuals constituting them, and the franchises conferred are to be exercised for their advantage. The corporation stands to them in the relation of trustee holding

the property owned by it for, and dividing the profits arising from its management and the employment of its franchises for, those individuals as *cestuis que trust*. Upon the other hand, public corporations are created for public purposes, and the property controlled by them is devoted to the objects for which they are created. The corporators have no private beneficial interest either in the franchises granted or the property controlled. The only private right which an individual can have in such a corporation is the right of being and acting as a corporator. So far as the property of the corporation is concerned, the interest which the corporators have as individuals is that common interest which all citizens have in property belonging to the State. Nor is the character of this interest affected by the source from which the property comes. A purchase by or a gift of property to the corporation is in reality a purchase by or a gift to the public, and is to be administered by the corporation as an agency of the State."

(Record p. 40).

With the greatest respect for the learned Court and the able Chief Justice who delivered the opnion, we submit that he is in error in the distinction he here seeks to make between private and public corporations.

We insist that a private corporation might have every element he here points out as characteristics of public corporations. He is in no wise correct in his definition of either public or private corporations. In the leading case on this subject—the Trustees of Dartmouth College vs. Woodward, 4 Wheaton, page 514 *et seq.*—the distinction between public and private corporations was fully discussed by the great lawyers engaged in that famous cause and in the opinions of the members of the Court.

Chief Justice Marshall said:

"Strictly speaking, public corporations are such only as are founded by the Government for public purposes where the whole interests belong to the Government."

Again he said the government would have no right to interfere with or control a corporation or its property, "except where the corporation is, in the strictest sense, public; that is, where its whole interest and franchises are the exclusive property of the Government itself."

Mr. Justice Story in his opinion in that cause said:

"When the corporation is said at bar to be public, it is not

merely meant that the whole community may be proper objects of bounty but that the Government have the sole right as trustees of the public interests, to regulate, direct and control the corporation, its funds and its franchises at its own good will and pleasure. Now ,such an authority does not exist in the Government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the Government itself."

Again he said:

"Public corporations are generally esteemed such as exist for public or political purposes only, such as towns, cities and counties, and in many respects they are so, although they involve some private interests; but strictly sepaking public corporations are such only as are founded by the Government for public purposes, where the whole interest belongs also to the Government."

And again:

"The charity then in this sense may be public, though it may be administered by private trustees; and for the same reason it may be public, though administered by a private corporation. The fact then that the charity is public affords no proof that the corporation is also public, and the argument so far as it is built on this foundation, falls to the ground."

Mr. Justice Washington, in his opinion in the same cause, said:

"These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitutions, may very well differ in matters which concern their rights and privileges, and their subjection to public control. The one is the mere creature of public institutions, created exclusively for the public advantage, without other endowments than such as the king or the Government may bestow upon it, and having no other founder or visitor than the king or Government, the *fundator incipiens.*"

This Court is, of course, too familiar with the facts of that case for it to be necessary to discuss the same in detail; but every element which is referred to by the learned Court in the Dartmouth College case as constituting such institution a private, as distinguished from a public corporation, will be found to exist in the case at bar.

In the Dartmouth College case the trustees were appointed by the crown. In this case they were appointed by the Legislature of Tennessee in an act creating the corporation.

In that case the State of New Hampshire was one of the contributors in that it granted a part of the public land to that institution. In this case the State of Tennessee granted nothing and contributed nothing to Carrick Academy. In that case the institution was given the power of perpetual succession. This power was granted the Trustees of Carrick Academy. The charter in that case gives the Trustees the right to receive private donations and buy and sell real estate for the use of the institution. Exactly the same powers were conferred upon the Trustees in this case. In that case the institution was supported by funds contributed by private donors and by the State of New Hampshire. In this case the Academy was supported by private donations and by trust funds arising from the sale of property contributed for this purpose by the Government of the United States.

These principles have not been confined in their application to the peculiar facts developed in the Dartmouth College case, but have been applied by this Court and other leading American Courts to all similar charitable and educational institutions.

In the case of Allen vs. McKeen, 1st Sumner, p. 276 (Federal Cases Vol. 1, case 229, page 489) Mr. Justice Story, sitting at Circuit, held Bowdoin College to be a private corporation, though it was endowed and chartered by the State of Massachusetts.

The provisions of the charter in that case were very similar to those contained in the charter involved in this case, and no reason can be found why that corporation should be treated as private and this as public.

Among other things the learned Justice in delivering the opinion, said:

"Nor does it make any difference that the funds have been generally derived from the bounty of the Government itself. The Government may as well bestow its bounty upon a private corporation for charity as upon a public corporation, and its funds once bestowed upon the former becomes irrevocable precisely in the same manner and to the same extent as if they had been bestowed upon an individual. The Government cannot resume a gift once absolutely made to a private person, neither can it resume a like gift to a private corporation. It is true that the Government may reserve such power in granting a charter, if it chooses so to do, but then the power arises from the very terms of the grant and not from any implied authority derived from the bounty being for general charity, any more than it would from its being for private charity."

A case, however, more directly in point, on account of the similarity of the particular facts in the two cases, is that of the Trustees of Vincennes University vs. The State of Indiana, 14 Howard, p. 267.

In that case the United States Government in ceding certain land to the Territory of Indiana, before the admission of the State of Indiana into the Union, provided that certain parcels of real estate should be reserved for the purpose of establishing a University in that Territory. Afterwards, in 1807, the Legislature of that Territory incorporated the Vincennes University under the name of the "Board of Trustees of the Vincennes University." This act authorized the Trustees to dispose of sai dlands for the use of said University, which was duly established. Afterwards, in 1820, the Legislature of Indiana appointed a superintendent authorized to rent out such portions of said lands which had not been sold, and collect the rents for the same, to be paid into the State treasury. In 1822 the Legislature appointed Commissioners to sell said lands, which was done, and the money was paid into the State treasury. Many years later the Legislature of Indiana, upon the petition of the Trustees of the University, passed an act authorizing said Trustees to bring suit against the State for the recovery of said funds. Suit was brought under this act in 1838. The Supreme Court of Indiana held that these Trustees constituted a puublic corporation, an institution of the State, subject to the control of the General Assembly, and that the property was owned by the State. The reasons assigned by that Court for its holding were very similar to those given in the opinion of the Supreme Court of Tennessee in the case at bar.

On writ of error this Court reversed the holding of the Supreme Court of Indiana, and it was here held that the Trustees of Vincennes University were a private corporation, created such by its charter, and that the State of Indiana had no interest in, or right of control over, said property.

The Court quoted, with approval, from the opinion in the Dartmouth College case and among other things said:

"The seminary township in question was not a donation from the state, but from the United States. It was reserved and designated out of the public lands before they were offered for sale.

And again:

"The legislative power of the territory and state in advancing the public interests was bound to afford all the facilities necessary

to carry out and secure the benign objects of congress in making these township reservations. This was done by a wise and liberal act in regard to the Gibson township. The corporators were vested with all the necessary powers to carry out the trust. And for the purposes of the trust the title became vested in them as soon as they acquired a capacity to receive it. This corporation had no political powers and could in no legal sense be considered as officers of the state."

And again:

"So far as regards the trust confided to the Complainants there is nothing which by construction can make it a public corporation. The donation in no sense proceeded from the state. It was made b ythe Federal government, and is no more subject to state power than if it had been given by an individual for the same purpose. An act of incorporation being necessary would not be withheld to give effect to a private donation of land for the purpose of establishing a literary institution. Its benefits would be enjoyed by the public generally, but this would not make it a public corporation. The Complainants by accepting and exercising their corporate powers acquired certain rights and made certain contracts which could not be impaired by the legislature. They constituted an eleemosynary corporation in which the state has no property and can exercise no power to defeat the trust."

In the case of the Trustees of New Gloucester vs. Bradbury, 11 Maine, p. 118, the question involved was whether the plaintiffs constituted a public or private corporation. The Commonwealth fo Massachusetts had granted to the town of New Gloucester a tract of land for the use of the schools of that town. Afterwards it was thought advisable by the town to have the land sold and on application the legislature of Massachusetts passed an act authorizing the sale of said school lands to raise a fund for the support of the schools of said town. This act appointed trustees for that purpose. They were created into a corporation with power to sell said school lands and use the proceeds for the schools in said town and with power to receive grants and donations for this purpose. They were given the usual powers conferred upon such corporations for this purpose.

The Court held that, notwithstanding the original grant of the lands came from the state, and notwithstanding the use to which the corporation was required to apply its funds was public still the corporation itself was a private one and not subject to the regulation or control of the state.

In the case of Yarmouth vs. North Yarmouth, 34 Maine, p. 114, the legislature of that state incorporated certain parties with their successors as trustees for a school fund in North Yarmouth and authorized them to sell the school lands of said town and convert the proceeds into funds and to apply the income therefrom forever to the schools of that town. Afterwards the legislature passed an act dividing the town and incorporating one portion thereof under the name of Yarmouth and in the same act it ordered that these trustees divide the school fund in the proper proportion between the two towns. The trustees resisted this act on the ground that it was an unconstitutional interference with their rights as a private corporation. The Supreme Court held the act unconstitutional as impairing the charter rights of these trustees. Among other things the Court said:

"The distinction between public and private corporations has reference to their powers and the purposes of their creation. They are public when created for public purposes only, connected with the administration of the government, and where the 'whole interests and franchises are the exclusive property and domain of the government itself."

And again:

"This fund was never in the town but was vested by the act in the trustees as a corporation for the use mentioned forever. They did not constitute a municipal or public corporation, although the object of its creation might have been a public benefit. Their charter was a grant from the state, partaking the nature of a contract, which they accepted, and in which the government had no interest. This was a franchise which involved the right to possess and control property and the right to perpetuate a corporate immorality."

In the case of Cleaveland vs. Stewart et al. in 3rd Georgia, p. 383, the Supreme Court held an academy incorporated by the legislature in that state to be a private corporation, though it derived its funds in part from the state.

Among other things the Court said:

"An incorporated academy founded on private funds is, like a college, a private corporation. It is no denial of this position that they are entitled, under certain conditions, to share in the common fund. This bounty the academy can receive or not. It

is a beneficiary of the state but that gives the state no rights over it."

And again:

"A corporation is public when it has for its object the government of a portion of the state; and although in such a case it involved some private interest, yet as it is endowed with a certain portion of political power, the term public has been deemed appropriate. Another class of public corporations are those which are founded by the public, although not for political or municipal purposes, and the whole interest in which belongs to the government."

In the case of the Board of Education vs. Greenbaum, 39 Illinois, p. 609, suit was brought by Greenbaum & Sons against the "Board of Education of the State of Illinois" to enforce a mechanic's lien on the property of the Normal University of that state. The defense was that this corporation was founded by the state and supported by the funds of the state, and that its property was the property of the state and therefore not subject to a mechanic's lien.

An act was passed in 1857 by the legislature of Illinois establishing a normal university and creating its trustees a corporation styled "The Board of Education of the State of Illinois," and which were given the usual powers conferred on such trustees. The superintendent of public instruction of the state was made the secretary of this board and required to make his reports to the General Assembly.

It was provided that the interest on the university and seminary funds of the state should be appropriated for this university and paid from the treasury of the state. Certain other public appropriations were also made. In 1861 the legislature passed an act which recited that by a compact between that state and the United States government in 1818, it was provided that a certain per cent. of the proceeds of the sales of public lands, lying in that state, should be appropriated by the legislature for the encouragement of learning and one-sixth of which was to be bestowed upon a college or university. The act provided that this, with the accrued interest thereon, should be appropriated, according to the intentions of congress, for the use of said Normal University, and further provided that the university should have no power to sell any part of the property or create a debt against the state. It was also provided that each county should be entitled t ofree instruction for two pupils in said university.

The Court in the opinion said:

"From this legislation plaintiffs in error insist that the property of the Normal University is the property of the state in which the corporation have no interest whatever. That it was created for certain public purposes in which the whole state has an interest, and certain rights secured to each county in the state. That the governor by and with the advice and consent of the senate, appoints the trustees who compose the corporation. That the superintendent of public instruction is, ex officio, a member of the Board and the secretary thereof, whose duty it is to report to the legislature the condition and expenditures of the university. The counsel also insists that the legislature have the absolute right to repeal or modify the charter, and from the act of 1861 it is manifest it was not the intention of the legislature that the property held in the name of the boar dshould be sequestered and sold by creditors or others. That the corporation is a mere trustee or agent of the state, to carry out the wishes and intentions of the legislature, and its property can only be used for corporate purposes."

To which insistence the Court responded:

"The view we have taken, after mature consideration of this legislation, differs materially from the plaintiff in error, and though striving to do so, we have not been able to find, in either of these acts, any provisions on which to base such an opinion, or any power reserved to the legislature to repeal or modify this charter.

We regard this university as an eleemosynary institution, founded for the purpose of the gratuitous distribution of knowledge of the art of teaching and conducting common schools, and erected, not at the expense of the state, but of individuals. An agent was to be appointed by the corporation to visit the different cities, villages and other places in the state, deemed eligible for the purpose, to receive donations and proposals for the establishment and maintainance of the university, and its permanent location was to be fixed at the place where the most favorable inducements were offered for that purpose.

The salaries for the instructors and other employes are fixed by the board and no appropriation has ever been made from the state treasury for its maintainance. This is one feature which distinguishes it from other state institutions properly so-called, such as the asylum for the blind, for the insane and for the deaf and dumb, for all which locations were selected by the state, build-

ings erected and furnished, teachers employed and appropriations made out of the public treasury at almost every session of the legislature, as the public acts will show. It is true the state applied the interest of the university and seminary fund to aid in maintaining this university, but that interest did not belong to the state. The state held it as a mere trustee under a compact with the general government, and it was specially devoted by that compact to a college or university."

Again the Court said:

"The reason that the legislature reserved the appointment of the trustees was, doubtless because it had placed in their keeping a fund of which the state was but a trustee, and morally responsible for its proper application."

The question of whether the Board of Education of Illinois was a public or private corporation was again before the Supreme Court of that state in the case of The Board of Education vs. Bakewell, 122 Ills., p. 339.

In that case the legislature by a subsequent act attempted to divert a part of the funds from the university and confer the same upon another, which the Court held could not be done, even with the consent of the corporation itself.

The Court said:

"It would seem to be supposed, here, that the corporation and the legislature together had the right of absolute disposition of this corporat property. But there are other rights and intersts than of these bodies here involved. Appellant is but a trustee of this property, to hold and administer it for the special purposes named in its charter, the education of the teachers for the common schools. The benefactions were devoted by the donors to this special purpose, and be applied to no other. Appellant stands here as representing the donors, and their rights are to be defended and maintained by it. And so with respect to those who are to derive learning from this source, appellant is a trustee for them also. Religion, charity and education are, in the law, legatees or donees, capable of receiving bequests or donations in this form. (Dartmouth College vs. Woodward, 4 Wheat. 643.) Before the courts, it will not be suffered that there shall be any abuse of the trust and it will be seen to that the property shall not be diverted from the object to which it was devoted by the donors. To take this property in question from the Board of Education of the State of

Illinois and give it away to Julia A. Blakewell, would be a clear perversion of the trust upon which the property is held."

In the case of Downing vs The State Board of Agriculture 12 L. R. A., p. 664, decided by the Supreme Court of Indiana in 1891, the question involved was whether the defendant was a public or private corporation.

In 1851 the legislature of Indiana passed an act for the encouragement of agriculture. Several persons were named in the act as a body corporate with perpetual succession, under the name and style of "The Indiana State Board of Agriculture." The Board was to meet at the time named by the governor of the state and organize, and was required to hold state fairs for the benefit of the people of the state. It was further provided that the presidents of each County Agricultural Society should be members of this Board and should meet with the same annually. It was provided that the Board should make an annual report to the General Assembly of the state, as to its condition and make such recommendations as it might deem interesting and useful. One thousand dollars per annum was appropriated out of the treasury of the state for the benefit of the Board. Afterwards other appropriations were made and from these appropriations the corporation acquired some property. In 1881 an act was passed abolishing this Board and transferring its funds and assets to a board of another name created by the General Assembly.

The Supreme Court of Indiana held this act to be unconstitutional because said board was a private corporation and not subject to the control of the General Assembly of the state.

The Court in that case reviewed at some length the various authorities on this subject and among other things, said:

"The trustees so elected have no financial interest in the property of the corporation in such a sense as that they can sell it and appropriate the proceeds to their own use, any more than could the trustees of the State University sell and convert the proceeds of the property to their own use. They are simply trustees to manage and control it. The institution, the corporation exists for the benefit of the people of the state, and the law would not allow its purpose to fail by a failure of those charged with the duty of electing the successors; but neither the state by its General Assembly, nor the trustees of the corporation have any right to appropriate the property of the corporation to the use of the state or the individual members of the Board."

In the case of the University of Maryland vs. Williams, 9 Gill & J., pages 365-368, the Supreme Court of Maryland, said:

"A corporation may be private and yet the act or charter contain provisions of a purely public character introduced solely for the public good. A public corporation is one that is created for political purposes, with political powers to be exercised for the purposes connected with the public good, in the administration of the civil government and an instrument of the government, subject to the control of the legislature and its members officers of the government for the administration and discharge of public duties, as in the case of cities, towns, etc."

In reference to the institution involved in that case the Court said: "That the university was established under the direct authority of the state, through a special act of the legislature and that the charter contained provisions of a purely public character, nor yet that the institution was maintianed perpetually at the public expense does not make it a public corporation or constitute its endowment fund a public fund." See also,

State vs. Neff, 28 L. R. A., 409.
Montpelier Academy Trustees vs. George, 1 4La., 395.
Waterman on the Law of Private Corporation, Sec. 17.
Morrowetz on the Law of Private Corporation, Sec. 3-4.
Angell & Ames on Corporations, Sec. 13, 14 and 32.

Tested by these rules it can hardly be insisted that Carrick Academy was a public corporation. It was not organized for municipal or political purposes certainly. Neither was it provided in the charter or intended by the donors ,that this property, in whole or in part, should be the property of the state. It was not endowed bw the state nor has it ever been supported by the state. It is true that this academy, like other academies in the state, was chartered in order to receive a bounty conferred by the United States government, but in chartering this corporation to receive this bounty and other private donations, and in selling the land ceded by the government for this purpose, and conferring the funds upon academies, the state acted only as a trustee, in compliance with its solem ncompact with the general government. This was so held by this Court in the case of the Trustees of the Vincennes University vs. the State of Indiana, *supra*.

By the Supreme Court of Illinois, in the cases of the Board

of Education vs. Bakewell, *supra*. and Board of Education vs. Greenbaum *supra*.

Even if this endowment had come from the state, the state lost its ownership in the same and the right to control it when it conferred the property upon the corporation.

The fact that the corporation was endowed by the state would in no sense make it a public corporation, is held in the cases of:

Trustees vs. Bradbury, *supra*.
Yarmouth vs. North Yarmouth, *supra*.
Downing vs. Indiana State Board, *supra*.
Cleaveland vs. Stewart. *Supra*.
Trustees of Dartmouth College vs. Woodward, *supra*.

One of the reasons given in the opinion of the Supreme Court of Tennessee, why this should be treated as a public corporation was that the original trustees were named by the legislature and it was provided that the legislature should fill vacancies in the board when such should occur from death or resignation.

In the Dartmouth College case the original trustees were appointed by the crown; most of them were public officials.

In all of the other cases hereinbefore cited, the trustees were appointed by the various legislatures in granting the charters. In incorporating the "Board of Education of the State of Illinois," the legislature reserved the right to fill vacancies in the board of trustees, yet the Supreme Court of that state held, in the cases cited, that it was a private corporation and that the reservation of this right of appointing trustees did not change the character of the corporation, or in any manner make it a state institution.

Board of Education vs. Greenbaum, *supra*.
Board of Education vs. Bakewell, *supra*.

One of the reasons insisted on in the opinion of the Supreme Court of Tennessee, as indicating that this was a public corporation, is that the General Assembly passed an act in which it attempted to regulate the manner in which students should be expelled from these academies.

In the first place this act was passed after the granting of the charters and it could not effect the rights of corporations which were already in existence. But even if this provision had been in the charter, it would not be material. In the Dartmouth College case the charter not only provided for an oath to be taken by all

officials, professors and tutors in the school but expressly provided that no religious test should ever be applied in admitting students in the college.

Again it is stated, in this opinion, that the academy must be treated as a public corporation because the Legislature of Tennessee has so treated similar corporations.

In all cases we have cited the various legislatures have attempted to treat the corporation, in question, as institutions of the State.

This was true in the Dartmouth College case and it was insisted by the Court of last resort in the State of New Hampshire, just as held by the Supreme Court of Tennessee, in its opinion, that Dartmouth College was a public institution of the State of New Hampshire.

In the Vincennes University case, the State of Indiana had for more than twenty years treated the real estate of that university as State property and had collected, and used, the rents and proceeds arising from the same, as property of the State. In the first Illinois case cited, the corporation itself insisted that it was a public corporation and its property exempt from legal process.

In the last case herein cited from Illinois, both the State and the Board had attempted to treat the property as State property.

The State of Indiana treated the property of the Indiana State Board of Agriculture as public property, and as such attempted, by an act of its General Assembly, to confer the same upon another corporation.

This was also true in both of the Maine cases cited, and in none of these cases was it held that because the State had *assumed* this right, it therefore *had* the right.

Nor can the argument be sound that because the State had made an illegal disposition of the property of other institutions, it was therefore within its power to confiscate the property of this institution. Such an argument carries with it its own condemnation.

It is insisted by the Supreme Court of Tennessee that Carrick Academy is not a private corporation, and that the trustees have no right to maintain this suit, because they have no personal interest in the corporation or its property. In the Dartmouth College case, Chief Justice Marshall said:

"The founders of the College, at least those whose contributions were in money have parted with the property bestowed upon it, and their representatives have no interest in that property. The

donors of the land are equally without interest, so long as the corporation shall exist. Could they be found, they are not affected by any alteration in its consitution, and are probably regardless of its form or of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college nor the youth for whose benefit it was founded complain in the alteration in its charter or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected."

And again, along the same line in discussing the rights of the donors, the learned Chief Justice said:

"The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in thir place, and distributes their bounty, as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive their learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are in the aggregate, to be exercised, asserted and protected b ythe corporation."

Mr. Justice Storey in his opinion in the same case said:

"The corporation was expressly created for the purpose of distributing in perpetuity the charitable donations of private benefactors. By the terms of the charter, the trustees and their successors, in their corporate capacity, were to receive, hold and exclusively manage, all the funds so contribuated. The crown then, upon the face of the charter, pledged its faith that the donations of private benefactors, should be perpetually devoted to their original purposes, without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its corporate franchise should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it would be a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon then as a donation was made to the corporation,

there was an implied contract spring up, and founded on a valuable consideration, that the crown would not revoke, or alter its charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter."

Now in the case at bar, the State of Tennessee provided in its charter that the trustees of this academy were empowered to receive by purchase or gift both real estate and personal property for the uses and purposes of the corporation. It was not provided in this charter that this property was to be received for the State or subject to the future distribution of the General Assembly. On the contrary, it is held that they are empowered "to purchase, receive, and hold to *them and their successors forever* any lands, tenements, rents ,goods or chattels which should be given or devised to, or purchased by them for the use of said academy."

Here is an express contract that any property conveyed or given to this corporation should be held by it forever. Upon the faith of this contract, this academy received the property in controversy.

As stated in the opinions of Chief Justice Marshall and Mr. Justice Storey, above quoted, this was a contract between the State of Tennessee and the corporation, that said corporation should receive and hold forever, all property conveyed to it. It was a contract between the State of Tennessee and all proposed or future contributors, or donors, that all property conveyed to this corporation should be held by the corporation forever, without molestation from the State or alteration of the charter rights conferred. It created a contract between the corporation and all the donors that the corporation should take and hold the property for the uses and purposes set forth in its charter forever, or if sold, its *proceeds* were to be applied to the uses and purposes set forth in the charter. It was a contract between the corporation and the beneficiaries contemplated by the charter and by the donors, that the corporation would take and hold the property for said uses and purposes forever. And for these donors, this corporation is a trustee and has a right to sue, and for the beneficiaries of these trusts, this corporation is a trustee and has a right to sue.

As stated by the Court above quoted this corporation represents the rights of all parties in interest, and for all it has a right to bring this action to protect these trusts. As has hereinbefore been shown,

the State could not destroy this trust neither could the State and the corporation jointly do this.

In this case, however, the former trustees who made the lease we are complaining of, did not attempt or pretend to do so under their charter power. They knew, of course, the rights given them by the charter was only to sell and convey the property for the purpose of their trusts. They were the trustees of Winchester Normal College as well as the trustees of Carrick Academy. They realized, of course, that they had neither the legal nor moral right to convey this property to themselves and they did not attempt to do this.

The lease we are complaining of recites on its face that it was executed pursuant to the authority conferred by the act of the Legislature, passed March 30th, 1881, and the contract concludes: *"It is intended that this lease should be as full and effective as is authorized by said act, but no further or otherwise."*

This lease is, therefore void unless the General Assembly of Tennessee had a right to destroy this corporation, terminate its existence, and confer its property upon a private corporation or private individual.

We earnestly submit that it is neither just nor legal that this property, conveyed to this corporation upon the faith of the solemn contract between the State of Tennessee and the donors who intended it for the school children of Franklin County, should be taken from them and bestowed upon private individuals. In doing this, the State violated its own solemn contract as set forth in the charter, breached its contract with the Federal Government, destroyed the rights of the school children of Franklin County, created upon the faith of this charter, and violated the contract clause of the Federal Constitution. The decree of the Supreme Court of Tennessee should be reversed.

Respectfully submitted,

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APPENDIX.

CHAP. 10.—An act to ratify and confirm an act of the Congress of the United States of America, entitled, "An act to authorise the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same." (Passed September 6th, 1806.)

Whereas the United States, in Congress assembled, on the eighteenth day of April, in the year of our Lord, one thousand eight hundred and six, passed an act, entitled "An act to authorise the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims, to the vacant and unappropriated lands within the same." In the words following to-wit: "An act to authorise the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same.

1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* that for the purpose of defining the limits of the vacant and unappropriated lands in the State of Tennessee, hereafter to be subject to the sole and entire disposition of the United States, the following line be, and hereby is established, to wit: Beginning at the place where the eastern or main branch of Elk river shall intersect the boundary line of the State of Tennessee; from thence running due north, until said line shall intersect the northern or main branch of Duck river; thence down the waters of Duck river, to the military boundary line, as established by the seventh section of an act of the State of North Carolina, entitled, "An act for the relief of the officers and soldiers of the Continental line, and for other purposes," (passed in the year one thousand seven hundred and eight-three) thence with the military boundary line, west, to the place where it intersects the Tennessee river; thence down the waters of the river Tennessee, to the place where the same intersects the northern boundary line of the State of Tennessee.

2. *And be it further enacted,* That upon the Senators and Representatives from the State of Tennessee, by an instrument signed and sealed by them respectively, making known, that in pursuance of the power in them vested by an act of the General Assembly of the State of Tennessee, entitled, "An act to appoint agents to settle the dispute between this State and the United States, relative to the vacant and unappropriated lands within this State, and to procure the relinquishment of the claim of the United States to the same," and by a resolution of the Senate and House of Representatives of the said State of Tennessee, passed in the year one thousand eight hundred and two, as instructions therein, they do, for, and in behalf of the State of Tennessee, and in consideration of the provisions made in this act, agree and declare that all right, title and claim, which the State of Tennessee hath to the lands lying west and south of the lines herein before established, within the limits of the State of Tennessee, shall thereafter forever cease, and that the lands aforesaid shall be and remain at the sole and entire disposition of the United States, and shall be exempted from every disposition or tax made by order, or under the authority of the State of Tennessee, while the same shall remain the property of the United States, and for the term of five years after the same shall be sold; which said instrument shall be approved by the Senate of the United States, and entered at large in their journal, and deposited in the office of the Secretary of State. The United States do thereupon cede and convey to the State of Tennesse, all right, title and claim which the United States have to the territory of the lands lying east and north of the line hereinbefore established, within the limits of the State of Tennessee, subject to the same conditions as are contained in the act of the General Assembly of the State of North Carolina, entitled, "An act for the purpose of ceding to the United States of America, certain western lands therein described," and the said State of Tennessee shall thereupon have as full power and authority to issue grants and perfect titles to all lands lying east and north of the before described line, within the limits of said State, as Congress now have, or the State of Tennessee might have by virtue of an act of the State of North Carolina, entitled, "An act to authorise the State of Tennessee to perfect titles to lands reserved to this State by the cession act," to which said act the assent of Congress is hereby given, so far as is necessary to carry into effect the object of this compact; subject, nevertheless, to the following express conditions, that is to say:

First—That all entries of land, rights of location and warrants of surveys, and all interfering locations which might be removed by

the aforesaid act of cession of the State of North Carolina, and which are good and valid in law, and which were not actually located west and south of the hereinbefore described line, before the twenty-fifth day of February, one thousand seven hundred and ninety; and all interfering grants which are good and valed in law, and which have been located east and north of the said line, shall be located, and the titles thereto perfected within the territory hereby ceded to the State of Tennessee.

Second—That the State of Tennessee shall appropriate one hundred thousand acres, which shall be located in one entire tract within the limits of the lands reserved to the Cherokee Indians, by an act of the State of North Carolina, entitled, "An act for opening the land office for the redemption of specie and other certificates, and discharging the arrears due the army," passed in the year one thousand seven hundred and eighty-three, and shall be for the use of two colleges, one in east and one in west Tennessee, to be established by the Legislature thereof; and one hundred thousand acres in one tract, within the limits last aforesaid, for the use of academies, one in each county in said State, to be established by the Legislature thereof; which said several tracts shall be located on lands to which the Indian title has been extinguished, and subject to the disposition of the Legislature of the State, but shall not be granted or sold for less than two dollars per acre, and the proceeds of the sales of the lands aforesaid, shall be vested in funds for the respective uses aforesaid, forever; and the State of Tennessee, shall moreover, in issuing grants and perfecting titles, locate six hundred and forty acres to every six miles square in the territory hereby ceded, where existing claims will allow the same, which shall be appropriated for the use of schools for the instruction of children forever: *Provided*, That nothing contained in this act shall be so construed as to effect the Indian title, or to subject the United States to the expense of extinguishing the same: *And provided also*, That the lowest price of lands granted or sold within the ceded territory, shall be the same as shall be established by Congress for the lands of the United States: *And provided nevertheless*, That the people residing in said State, south of French Broad and Holston, and west of Big Pigeon rivers, provided for by the constitution of the State of Tennessee, shall be secured in their respective rights of occupancy and pre-emption, and shall receive titles for such quantities as they may respectively claim, including their improvements, not exceeding six hundred and forty acres each, nor exceeding the quantities they have heretofore claimed respectively, according to their conditional lines, where such have been established, at a price not less than one

dollar per acre: *And provided further*, That nothing herein contained shall be construed to enable any person or persons until authorised by the Legislature of the State of Tennessee to locate any warrant issued under the authority of the State of North Carolina, within the limits of the lands reserved to the Cherokee Indians, by the fifth section of the act of said State, entitled "An act for opening the land office for the redemption of specie and other certificates, and discharging the arrears due the army," passed in the year one thousand seven hundred and eighty-three.

3. *And be it further enacted*, That if the territory hereinbefore ceded to the State of Tennessee, shall not contain a sufficient quantity of land fit for cultivation, according to the true intent and meaning of the original act of cession, including the lands within the limits reserved by the State of North Carolina to the Cherokee Indians, to perfect all existing legal claims charged thereon, by the conditions contained in this act of cession, Congress will hereafter provide by law for perfecting such as cannot be located in the territory aforesaid, out of the lands lying west or south of the before described line.

NATHL. MACON,
Speaker of the House of Representatives.

S. SMITH,
President of the Senate, pro tem.

Approved—April 18th, 1806.

TH. JEFFERSON.

THEREFORE, Be it enacted by the General Assembly of the State of Tennessee, That the same hereinbefore recited act, be, and the same is hereby accepted, ratified and confirmed to all intents and purposes, by and on the part of the State of Tennessee, and that the provisions thereof be carried into effect.

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JAMES H. McKENN

NO. 159.

In the Supreme Court of the United States

OCTOBER TERM, 1906.

D. S. OSBORNE, ET AL., TRUSTEES OF CARRICK ACADEMY,
Plaintiffs in Error,

vs.

R. A. CLARK, AND WINCHESTER NORMAL COLLEGE,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

NO. 159.

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vs.

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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

REPLY TO THE MOTION TO DISMISS AND ARGUMENT FOR DEFENDANTS IN ERROR.

May it please the Court:

We will first reply to the—

MOTION TO DISMISS.

It is insisted that no Federal questions were made by the plaintiffs in error in the Supreme Court of the State, either in the pleadings or in argument, as shown by the opinion of the Supreme Court.

We insist that two distinct Federal questions were raised, both in the pleadings and argument:

First—That the charter granted by the State of Tennessee to the Trustees of Carrick Academy created a contract, and that the rights of plaintiff in error under its charter were impaired by virtue of the Act of 1881, authorizing the lease of this property to Winchester Normal College.

Second—That the Act of Congress of 1806, ceding public lands to the State of Tennessee created a trust in favor of an academy in each county of the State, to be thereafter brought into being, and that the rights of plaintiff in error arising under this Act were destroyed by the lease complained of, which was made pursuant to the Act of 1881 of the General Assembly of the State of Tennessee.

We will discuss these propositions in the order stated.

The Federal question as to the impairment of the obligation of the contract was sufficiently raised in the pleadings.

The bill set out at length the history of the creation of this corporation, and the fact that it was chartered by an Act of the General Assembly of the State of Tennessee, and that it acquired the property described in the bill after its incorporation, and after it had perfected an organization under its charter, and that afterwards, in 1881, the Legislature passed the Act complained of, authorizing the lease complained of. The bill then charges that this Act authorizing the lease was void for several reasons, one of which was as follows:

> "Because said Act undertook to authorize the Trustees of Carrick Academy to appropriate its property to the use of another."
>
> (R. pp. 8-13).

It will be noticed that the substance of this bill is that complainant corporation's rights arose by virtue of the Act of Congress, and that it was duly incorporated by the charter

granted from the State, and that it was organized thereunder, and acquired the property in controversy; and that the State of Tennessee attempted by the Act of 1881, complained of, to authorize a diversion of this fund from the purposes for which the corporation was created.

The defendants demurred, and that cause of demurrer which was sustained by the Supreme Court, reads as follows:

> "Because the said lease of 1881 was, as is specifically shown in the bill, expressly authorized by Act of the legislature."
>
> (R. pp. 16-17.)

Thus the issue raised by the pleadings and decided by the Court was, whether the State of Tennessee had authority to authorize the diversion of this fund from the purposes of the corporation and for which it was organized.

True, the Federal Constitution was not mentioned in the bill. But it is manifest that the Federal question was raised. when the bill attacked the Act because it undertook to authorize the trustees to appropriate the corporation's property to the use of another.

It was raised by the demurrer, in which it was insisted that the General Assembly of Tennessee had a right to authorize a diversion of this fund.

In Columbia Water Power Co. vs. Columbia Elec. Street Ry., Light & Power Co., 172 U. S. page 474, the Federal Constitution was not mentioned either in the pleadings or in the opinion of the Supreme Court of South Carolina. But this Court held that a Federal question was raised, because the bill set up a contract, and the answer set up and relied upon a subsequent act of the Legislature of that State, which complainants insisted was in conflict with its rights under its contract set up in its complaint. And this subsequent legislation was given effect and sustained by the Supreme Court of South Carolina. This Court held that this, in itself, raised

a Federal question. That is to say, when the **facts** stated in the pleadings or appearing in the opinion of the Court showed a case where contract rights have been impaired by subsequent legislation of the State, the Federal question arises from these facts, notwithstanding the Federal Constitution was not mentioned, either in the pleadings or in the opinion of the Court.

In McCullough vs. Commonwealth of Va., 172 U. S. 104, this same question was considered by this Court and very elaborately discussed and the same conclusion reached.

And among other things, the Court said:

> "Suppose for illustration, a State Legislature should pass an act, exempting the property of a particular corporation from all taxation; and that a subsequent Legislature should pass an act, subjecting that corporation to the taxes imposed by the city in which its property was located, and that on the first presentation to the highest Court of the State of the question of the validity of the taxes levied under and by virtue of this last act, that the Court should, in terms, hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event, no one would question that this Court had jurisdiction to review such judgment and inquire as to the scope of the contract of exemption created by the first statute. Suppose, further, that this Court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as state, and adjudge the last act of the Legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the State Court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that this Court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the State Court in its opinion

changed the scope and effect of the decision? In other words, can it be that the mere language in which the State Court phrases its opinion takes from or adds to the jurisdiction of this Court to review its judgment? Such a construction would always place it in the power of a State Court to determine our jurisdiction. Such certainly has not been the understanding, and such certainly would seem to set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made or authorized to be made."

And again:

"Now it is one of the duties cast upon this Court by the Constitution and laws of the United States, to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty, if we should permit the form in which a State Court expresses its conclusions to override the necessary effect of its decision."

In the case of Yazoo & Miss. Valley R. R. Co. vs. Adams, 190 U. S. page 1, the Federal Constitution was not mentioned in the pleadings nor in the opinion of the Court, and does not appear to have been expressly raised otherwise than by a statement of the facts of the case, as appears from the opinion of this Court, as follows:

"Manifestly, that Court could not have held the railway liable for the taxes in suit without deciding either that the provision of Sec. 21 did not constitute a legal contract in view of the Constitution of 1869, or that no such contract existed in favor of the plaintiffs in error in view of the consolidations, or that the subsequent tax legislation of the State of 1892 and 1894 did not impair the obligation of that contract. All these were Federal questions, the vital one being whether the acts of 1892 and 1894 impaired the obligation of the contract, if any existed.

"In short, the case is one of those frequently arising under the second clause of Rev. Stat. Sec. 709, in which the validity of a State statute under

the Constitution of the United States is necessarily drawn in question, and, the decision of the State Court being in favor of its validity, this Court will take jurisdiction, though the Federal question is not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section, where a right, title, privilege, or immunity is claimed, that the Federal question must be specially set up."

THE OPINIONS OF THE COURTS.

It is well settled by this Court that the opinions of the Court may be looked to in determining whether or not a Federal question was raised and decided.

> Murdock vs. Mayor, etc., of Memphis, 87 U. S. 590.
> San Jose Land & Water Co. vs. San Jose Ranch Co., 189 U. S. 177.

The Court of Chancery Appeals.

Under Chapter 76 of the Act of 1895, the opinions of the Court of Chancery Appeals are made part of the record.

Mr. Justice Wilson delivered the opinion of the Court of Chancery Appeals, and, after reviewing the pleadings at length, said:

> "If this Act of 1881, authorizing the Trustees of the Academy to lease its property to the Winchester Normal College is constitutional, and the subject matter of the Act was under the control of the State, the case, in our opinion, is at an end, so far as the right of complainants to maintain this suit is concerned.

And again:

> "The writer is very much inclined to the opinion that the State had the power to dispose of the property of this Academy, or the authority to authorize its lease, as was done under the Act of 1881 referred to, for any legitimate educational end. I would certainly so hold, if the question, as an independent one, were free from the weight of the decision of the Supreme Court of the United States in the Dartmouth College case."

The Court then reviewed briefly the case of the Trustees of Dartmouth College vs. Woodard, in 4 Wheaton. Referring to that case, Mr. Justice Wilson said:

> "It seems that the Supreme Court of the United States in that case, were of the opinion that an insti-

tution organized and chartered for educational purposes, was a private corporation, and being such, was a contract between the State and the incorporators, **and as such protected by the clause of the Federal Constitution inhibiting legislation impairing the obligation of contracts.**"*

And again:

"It seems to us that the principle of this case, which is sustained by numerous other authorities, settles the law that, although Carrick Academy was incorporated by the State, and the State appointed its first Trustees, and although the State may have made donations to it for the purpose of enabling it to carry out the educational ends of its creation, it was still a private corporation, and, therefore, exempt from a diversion from its original charter purposes by legislative action. We are, therefore, of the opinion that it was not competent for the Legislature to authorize the Trustees of Carrick Academy to absolutely suspend its functions as a corporation, and to practically dispose of its properties to another institution, although educational, but operated for private gain."

R. pp. 32, 33, 34.

Counsel for defendants in error make an ingenious argument with reference to the discussion of the Dartmouth College case by the Supreme Court, in which they insist that this case was not considered by the Court with reference to the contract clause of the Federal Constitution, but only to determine the question as to whether Carrick Academy was a private or a public corporation, and that they were considering in this connection, the constitutionality of the act with reference to Sec. 8, Art. 11 of the Constitution of Tennessee, which prohibits the passage of any law for the benefit of individuals inconsistent with the general law of the land, and they were also considering that provision of the State Constitution which prohibits the passage of any law increasing or diminishing the powers of corporations by special laws. Mr. Justice Wilson very effectually dssposes of this insistence

* Bold face type is ours.

by his opinion. He refers to and sets out the Act of 1840, which provides that academy property shall not be used by any college in the state. And then the opinion recites:

> "This Act of 1840, it appears, was in force when the Act of 1881 was passed, under which the trustees of the academy purported to lease its property to the Winchester College. Counsel for complainants make a point **in this connection** that the act of 1881 is a law **for the benefit of the Winchester Normal College,** to the end that 'it was using academy property for college purposes.' The article of the Constitution said to be violated by this act **in this respect** is Sec. 8, Art. 11, which provides:" (The. opinion. then quotes the constitutional provision in full).

The Court held, however, that the whole question turned upon the other question it had theretofore discussed, and held the act to be unconstitutional for the reason stated.

Here it is distinctly shown that the Court of Chancery Appeals considered two questions. First—The validity of the Act, with reference to the contract clause of the Federal Constitution, and considering that question, they held Carrick Academy was a private corporation and, under the principles of the Dartmouth College case, its charter created a contract, and that the General Assembly of Tennessee was without authority to authorize the diversion of its funds.

Second—They also considered the question which was raised by counsel for complainants, as to whether or not the act was void because it attempted, by special legislation, to grant special immunities to the **Winchester Normal College**, in this that the Act of 1840 inhibited the use of academy property by colleges, and that this Act of 1881 attempted to confer the special privilege upon the **Winchester Normal College** to take and hold academy property in violation of the Act of 1840; and that this Act of 1881 attempted to increase the power of the **Winchester Normal College,** so as to confer upon **it** the right to use academy property, which right it had not there-

* Bold face type is ours.

tofore had, and which right had not been conferred upon like corporations in the State.

It will readily be seen that this provision of the Constitution set out in complainants' bill and referred to in the opinion of the Court of Chancery Appeals did not apply to the Carrick Academy, nor was the question of whether Carrick Academy was a public or private corporation involved in the discussion of this question, because if the Winchester Normal College was prohibited from holding or using academy property, the prohibition would be just as effective in the one case as in the other. In other words, if the Normal College was prohibited from using academy property, the question as to whether the academy property was **public** or **private** could make no difference. So that it is futile to attempt to argue that, either the Court of Appeals or the Supreme Court were considering the Dartmouth College case or the question as to whether the Carrick Academy was a public or private corporation with reference to this provision of the State Constitution, above quoted.

The Opinion of the Supreme Court of Tennessee.

The Court of Chancery Appeals having held that Carrick Academy was a private corporation, and that under the principle of the Dartmouth College case, it was "protected by the clause of the Federal Constitution inhibiting legislation impairing the obligation of contracts", defendants in error appealed to the Supreme Court of Tennessee.

The learned Chief Justice of that Court, in his opinion said that the controlling question was whether this was a private or public corporation. In his opinion he referred at length to the cases of:

Governor vs. McEwen, 5 Humphrey 241.

Mobile School Commissioners vs. Putnam, 44 Alabama 506.

Heard vs. Curators of Mo., 47 Mo. 224.

In all of these cases, the controlling question was whether or not the legislation complained of had impaired the charter rights of the corporation, and whether the charters of these corporations were contracts protected by the contract clause of the Federal Constitution under the principle of the Dartmouth College case. The learned Court then reviewed the Dartmouth College case, and said:

> "Upon these facts it was held that Dartmouth College was a private eleemosynary corporation, and that its charter was 'plainly a contract, to which the donors, the trustees and the Crown (whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration; it is a conract for the security and disposition of property; it is a contract on the faith of which real and personal estate have been conveyed to the corporation; **it is then a contract within the letter of the Constitution.**' " *
>
> "It is easy to see that the corporation styled 'The Trustees of Carrick Academy' finds no analogy to the one that was the subject of consideration in that case. So it is upon principle as well as authority that we hold that this corporation was a public agency, under the control of the State, and that the Act of the Legislature under which the lease of its property to the Winchester Normal College was made in 1881, was constitutional."
>
> R. pp. 35-43.

So that in both courts the decisive question considered and determined was whether the Act of 1881 impaired the contract clause of the Federal Constitution.

To show conclusively that counsel for complainants in error did insist upon this question before the Supreme Court, we quote again from the opinion of the Chief Justice, as follows:

> "The Court of Chancery Appeals adopted the view insisted upon by the complainant, and rested

* Bold face type is ours.

their conclusion upon the authority of the case of the Trustees of Dartmouth College vs. Woodard, 4 Wheaton 519."

While there are many other questions made as to the validity of this lease, and as to the validity of the Act authorizing the lease, and it is possible that the Court might have decided the case **in favor of** plaintiffs in error upon some of these other questions, still, it could not have decided the case **against them,** without deciding **all** the questions against their insistence, including which was this Federal question. In other words, the consideration of this Federal question was absolutely necessary to the decision of the case **against** the plaintiffs in error.

Right Claimed Under Act of Congress.

As heretofore shown, the bill sets out in detail the history of the origin of this academy and the trust fund created for it by the Act of Congress of 1806, which Act was specially set up and the right claimed thereunder, in the bill.

The insistence of defendants in error is and has been that this Act of Congress really conveyed the property to the State, and that by virtue of this Act, the State became the owner of the fund arising from the sale of this property, and that the academies endowed therewith were State agencies for this reason. Plaintiffs in error insisted that the State was only made a **trustee**, and that the fund was intended for Carrick Academy, and that the endowment of Carrick Academy with this fund did not make it a public corporation or State agency. The Supreme Court adopted the view of the defendants in error, and construed this Act of Congress according to their insistence. This was necessary to the decision of the case, as it was decided. And hence a Federal question arises.

Glascow vs. Baker, 128 U. S. 560.
Neilson vs. Lagow, 7 Howard 771.
Joplin vs. Chachere, 192 U. S. 94.
Shiveley vs. Bowley, 152 U. S. 1.
Kennedy Mining Milling Co. vs. Argonaut Mining Co., 189 U. S. 1.

DID THE ACT OF 1881 IMPAIR THE CHARTER RIGHTS OF CARRICK ACADEMY.

It is insisted by defendants in error that this Act did not impair the charter rights of Carrick Academy, because, it is insisted, the corporation already had the right to make this lease under its charter. This power, it is insisted, is contained in that part of the second section of the charter, which reads as follows:

"2. Be it enacted, That the trustees of each of said academies, and their successors, by the names

aforesaid, shall be capable in law to purchase, receive, and to hold to them, and their successors, forever, any lands, tenements, rents, goods or chattels, which shall be given or devised to, or purchased by them for said organization; and to sell and dispose of the same in such manner as to them shall seem most advantageous **for said academies.**"

By inadvertence, the last clause above quoted was omitted in the copy set out in our original brief in this cause, at page 2, and the latter part of the clause,—**for said academies**—was also inadvertently omitted in the copy set out in the brief of defendants in error, at page 15.

It is manifest that this provision of the charter did not authorize the lease here complained of, for two reasons: First—Because this provision of the charter clearly contemplates that the property is to be held for the use of the academies—"as to them shall seem most advantageous for said academies"; and it is not pretended that this lease to the Winchester Normal College, a private corporation, with which the Carrick Academy had no connection, could posibly be of any advantage to Carrick Academy, or the trusts for which it was created. The bill charges and the demurrer admits, that the Winchester Normal College was used for the **personal advantage** of defendant Clark alone and not for the benefit of the people or the youth of Franklin County. Second—It is too clear for argunent that the charter did not authorize the trustees to convey this property to **themselves.** The bill charges that the trustees of Carrick Academy were also the trustees of Winchester Normal College; and clearly there could be no exercise of discretion in a contract between two institutions having the same trustees. A so-called agreement between the two would be of course a farce; and the conveyance by these trustees of Carrick Academy property to another private corporation of which they were trustees, without consideration, for a period of fifty years, was so manifestly a breach of their trust, and so clearly illegal, that they did not attempt it without express legislative authority, which on its face authorized them to take over their trust property

and convert it to their own use, or which was the same thing, to the use of a private corporation, of which they were trustees. Indeed, the very lease itself shows that these trustees clearly understood that they had no right to convey this property to their own corporation except by virtue of this act we are complaining of. The lease begins by reciting the Act of 1881 and setting out its terms. It then recites the incorporation of the Winchester Normal College, and names its trustees, and then states:

> "And whereas, the Board of Trustees of Winchester Normal College, by resolution, have agreed to accept the lease provided for in said Act upon the terms and conditions prescribed therein * * *

And again:

> "We, the undersigned, as trustees of Carrick Academy, and in pursuance of the power vested in us by said Act, do hereby lease to the trustees of the Winchester Normal College, for the period of fifty years, the academy property belonging to Carrick Academy * * *"

After describing the property, the lease concludes:

> "And it is intended that this lease shall be as full and effective as is authorized by said Act, **but no further or otherwise.**" *

R. pp. 14-15.

From this it will be seen that the trustees expressly stipulated that they only took the property over to themselves under and by **virtue of the authority of this Act, and not** otherwise.

It is next insisted that the statute did not act upon the contract; that it only **authorized** the corporation to do a certain thing, and that the doing of that thing depended upon the will of the corporation Manifestly the act affected the rights of the corporation as clearly as if it had been an act

* Bold face type is ours.

authorizing the directors of a private business or trading corporation to convert the fund in their keeping to their own use. We submit that an act authorizing agents to convert to their own use, their principal's property, is **not** an act authorizing the **principal** to dispose of his property, on the theory that the agent acts for the principal.

But it is insisted that this act was assented to and acted upon by the corporation.

As a matter of fact, it was not, because, as we have before argued, the **corporation's** interests were not considered or provided for, either in the act or in the lease. The **trustees** interests were provided for in both, but where the trustees and the corporation have antagonistic interests, the action of the trustees cannot be said to be the action of the corporation, in such a way as to be binding on it in a court of equity.

The rule is stated in **Perry on Trusts (4th Ed.) Vol. 1, Sec. 207,** as folows:

> "It is said that contracts of trustees are of two classes. One class consists of contracts made by trustees with themselves, or with a board of trustees or directors of which they are members. These contracts are void from the fact that no man can contract with himself. If, therefore, a board of directors should convey all the property of the corporation to themselves, the conveyance would be void without any inquiry into its fairness, or whether it was beneficial to the corporation or not.
>
> "And the same rule applies if a board of directors convey the property of a corporation, or any part of it, to any one of their number, he being one of the trustees negotiating and contracting with himself. And the same rule was applied where the trustees of one corporation, being trustees of another corporation, conveyed the property of one corporation to another, although there was a decree of Court."

But even if the trustees had no interest in the Winchester Normal College, still they had no authority to assent or

agree to the transfer of this property for any purpose other than that provided in the charter under which they were acting.

The trustees are not the owners of the corporation or its funds. Their rights and powers are limited by the provisions of the charter under which they act. The real owners are the beneficiaries contemplated by the charter and the donors, who have contributed to the corporation upon the faith of the pledge of the State contained in the charter, that the corporation should exist **forever** and **forever** devote the property of the corporation to the purposes of the trust. It is well settled that the State cannot impair this trust. It is also well settled that the trustees cannot do so, and courts of equity have inherent power to protect the trusts and remove unworthy trustees when they attempt to divert the funds of the trust to uses other than that provided for in the charter, or in any manner attempt to destroy or impair the rights of the beneficiaries. Then, if neither the State nor the trustees have the power to divert this fund or to convey the property for a purpose other than that provided for in the charter, can it be said that the State may lawfully authorize the trustees to do so, and that the two powers combined may absolutely destroy the rights of beneficiaries and suspend the functions of the corporation?

It is well settled that they cannot.

This same question was involved and decided in the case of the **State vs. Adams, 44 Missouri 570.** In discussing the case, the Court said:

> "But in charities, the corporators are not owners of the fund, neither is it held for their use. Their consent would not affect their own property, but that of others, and their office of visitors, so far from giving them power to authorize any change in its management and control contrary to the will of the founders, imposes upon them rather the obligation of seeing that that will is made paramount."

And again:

"But on the other hand, if the general power of consent is lodged in the directors or curators, there is no security whatever in eleemosynary grants. The founder may recall or change the character of his gift. even after contributions to swell it have been made by others, or the directors of the corporation administering it may fancy they have a better way, or may be personally interested in another mode. The State can do nothing alone; the directors can do nothing alone (1 Watts & Serg. 36; 1 Burr 201); but, by their joint action, the whole character of the foundation may be changed. Our observations show the ease with which legislative action is sometimes had, and it seems to me that the dangers to all charities—their great liability to perversion, if such changes are permitted—are more to be dreaded than the inconvenience of the restriction."

The same question was involved in thec ase of the **Board of Education vs. Bakewell, 122 Illinois, page 339.** In that case the Court said:

"It would seem to be supposed, here, that the corporation and the legislature together had the right of absolute disposition of this corporate property. But there are other rights and interests than these involved. Appellant is but a trustee of this property, to hold and administer it for the special purposes named in its charter, the education of teachers or the common schools. The benefactions were devoted by the donors to this special purpose, and be applied to no other. Appellant stands here as representing the donors, and their rights are to be defended and maintained by it. And so with respect to those who are to derive learning from this source, appellant is a trustee for them also. Religion, charity and education are, in the law, legatees or donees, capable of receiving bequests or donations in this form. (Dartmouth College vs. Woodard, 4 Wheaton 643). Before the Courts it will not not be suffered that there shall be any abuse of the trust, and it will be seen to that the property shall not be diverted from the object to which it was devoted by the don-

ors. To take this property in question from the Board of Education of the State of Illinois and give it away to Julian A. Bakewell, would be a clear perversion of the trust upon which the property is held."

In the case of **Allen vs. McKean (1 Sumn. 276) 1 Federal Cases No. 229,** page 489, Judge Story held that the visitorial power of the founder was vested by the charter, in such corporations as this, in the trustees, and discussing this visitorial power, he said:

"But what is the nature and extent of this visitorial power? Is it a power to revoke the gift; to change its use; to divest the rights of the parties entitled to the bounty? Certainly not. It is a mere power to control and arrest abuses and to enforce a due observance of the statutes of the chartiy."

And again, in discussing the question we now have in hand:

"But if the acquiesecence of the board could be construed into an approval of the act (as I think it ought not to be) still that approval cannot give effect to an unconstitutional act. The legislature and the board are not the only parties in interest upon such constitutional questions. The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of the legislative power; and no private arrangement between such parties can supersede this."

No case has been cited to the contrary. The opinion of the Court in the **Pennsylvania College Cases, 80 United States page 190, cited** by adversary counsel, is not in conflict with our insistence. In that case the Legislature had reserved the right to amend, alter, or modify the charters of the corporations in question, and the act of consolidation complained of did not attempt to divert the fund or change the purpose for which these corporations were created. The Court said:

"The act of the Legislature uniting the two colleges did not contemplate that either college, as an in-

stitution of learning, should cease to exist, or that the fund of either should be converted to any other use than that prescribed in the original charters. All that was contemplated by the act in question was that the two institutions should be united in one corporation, as requested by the friends and patrons of both, that they might secure greater patronage and be able to extend their usefulness and carry out more effectually the great end and aim of their creation."

And again:

"Decided cases are referred to in which it is held that the trustees of such an institution where the the terms of the charter amount to a contract, and the charter contains no reservation of a right to alter, modify or amend it, cannot assent to any change in the charter made by the Legislature which contemplates a diversion of the funds of the institution to any other purpose than that prescribed and declared in the original charter."

The conclusion of the Court on this subject was:

"Nor can it be doubted that the assent of the corporations is sufficient to render such legislation valid, **unless it appears that the new legislation would have the effect to change the control of the institution or to divert the fund of donors to so some new use inconsistent with the intent and purpose for which the endowment was originally made.'**

And again:

"They did not pretend that the effect of the new legislation would be to lessen the influence and usefulness of the colleges, or to divert the fund to a different purpose from that which was intended by the donors, nor that it would have the effect to change the character of the institution from the original purpose and design of its founders."

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REPLY TO THE ARGUMENT THAT CARRICK ACADEMY IS A PUBLIC CORPORATION.

Counsel for defendants in error, in their brief, have not attempted to controvert the proposition insisted on in our original brief, in this cause, and so thoroughly sustained by the authorities—that a public corporation is one:

(a) That is chartered for the government of some political division of the State—some governmental agency, or,—

(b) Whose property is owned exclusively by the State.

The argumen tof counsel seems to be that this is a public corporation because the state was the **exclusive owner of its property,** as it certainly cannot be argued, and was not, that the corporation was vested with any **governmental powers.**

In making this insistence, adversary counsel assume, in the face of all the authorities to the contrary, that the State was the founder of this institution, because, under the compact with the general government, it sold a part of the public lands, and devoted the same to the use of this and other academies. Assuming for the present that this was a direct gift from the general government to the State of these public lands, and that the State made a direct gift of the proceeds of the sales of the lands to the academy, it has been held in numerous cases, cited in our original brief, that the endowmen tof a corporation by the State did not create same a public corporation, or make the State the owner of its property.

Trustee vs. Bradbury, 11 Maine 118.
Yarmouth vs. North Yarmouth, 34 Maine 114.
Downing vs. Indiana State Board, 12 L. R. A. p. 664.
Regents of University of Maryland vs. Williams, 9 Gill & J. 365.
Cleveland vs. Stewart, 3 Georgia 383.
Trustees of Dartmouth vs. Woodard, sup.
Allen vs. McKean, supra.

The argument is made, however, that if the State created a public institution of its own—a State agency, and private individuals voluntarily contributed to this agency, it would be a gift to the State, and not a contract that the donation should be devoted forever to the purposes of the institution. In all this counsel **assume** that the charter created a public agency of the State and not a private corporation. This must be settled by the terms of the charter itself. Does it create a contract? Does it provide that its property shall be the **State's** property, or the property of the **corporation?** Does it, in terms, or by implication, **reserve to the State** the right to terminate the corporation's existence and assume control of its property?

The second section of the charter, which has herein before been quoted, provides that said academy "shall be capable in law to purchase, receive and hold to them and **their successors forever** any lands, tenements, rents, goods or chattels which shall be given or devised to or purchased by them for said academies."

Here is an express contract that said academies shall have the power to acquire and hold property **forever** for the use of said academies.

There is no reference to any endowment from the State, or from the United States **in the charter.**. Whatever gifts the State contemplated bestowing on these academies, was a matter for future consideration, and when bestowed, would be a gift **to the use of the corporation forever,** under the express terms of its charter.

It was not, as insisted by adversary counsel, founded by the public fund provided either by the State or the United States.

These charters created academies in various counties, in the State, to be endowed, sustained and supported by the people of their respective counties, as appears from the terms of the charter. It was doubtless intended that these academies

should be asisted by the trust fund provided by the Federal government. This is shown by the Act of Congress and the legislative history of the State. But the people of the various counties were the real founders. Sec. 3 of the charter provides:

> "Be it enacted, That the said trustees shall have the power to fix and purchase a site for these academies, and **to take and receive subscriptions for paying for the same,** as well as for the purpose of erecting buildings thereto." *

This section then provides for suit to be brought against any subscribers who fail to pay their subscriptions, etc. Clearly it was contemplated that the site was to be purchased by private subscription by the people in the locality where the academy was situated.

And these subscriptions were made, and all donations were made upon the faith of the solemn contract of the State that the academy should exist **forever,** and that its property should be forever devoted to the purposes of the trust.

This provision in the charter empowered the **corporation** to hold property, and we submit settles the question that this property was not intended to be **State** property, but was to be **forever the property of the academy,** and this is true, regardless of how great a proportion of its funds came from the State. The **contract** pledges the faith of the State to all proposed donors, and to the corporation itself, that the State will never interfere with the corporation, and will protect it forever in its corporate functions.

In Regents of University of Maryland vs. Williams, supra, the Court said:

> "The extent of the property or funds it may have owned by donation or otherwise is not material. **The capacity expressly given to acquire and hold property in perpetuity** for the use and purposes of its institution is the same thing, **so far as it concerns its**

* Bold face type is ours.

character as a corporation, as the actual acquisition of it would be."*

We will now briefly review the cases cited by defendants in error in their brief.

We call the Court's especial attention to the fact that in **not one of these cases are charters considered which provide for private donations upon the faith of a provision that the corporation shall hold its property forever.** . . . . . .

In **Trustees vs. Winston, 5 Stewart & Porter, 17,** there was no attempt in this case to divert the funds of the corporation. No provision in the charter is shown, authorizing it to exist and hold its property forever. The Court said:

> "No citizen has contributed one cent, either in money, property, labor or services."

In **Mobile School Commissioners vs. Putnam, 44 Alabama 506,** the commissioners held the property for the public schools supported by public revenues, and wholly under the control of the state. No provision was contained in the charter that this property should forever be the property of the commissioners or that the same should forever be devoted to the trust. The Court said:

> "Is it reasonable to presume that the legislative body by which that act was passed, supposed they were committing to a mer private corporation, for all time to come, the great trust of the public education for so important a portion of the people of Alabama, and that, too, in such a way as to put it beyond the care and control of legislative authority." * . . * A fair intrpretation of the whole act itself shows no such purpose or intention was contemplated."

And again:

> "The legislature retained the power to alter, amend, perfect or repeal the same, as might in the future be thought best for the public good."

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* Boid face type is ours.

In that case it was not attempted to divert the fund, but only to change the manner of its administration.

Head vs. Curators of the University of Missouri, 47 Missouri, page 220.

This case merely involved the right of a professor to recover his salary after he had been removed by an act of the legislature. The Supreme Court of Missouri held that the curators of the university were not a private corporation, and under the facts stated, there certainly was not an element of a private corporation shown. No provision that they should exist forever as a corporation or that the property intrusted to the corporation should be forever devoted to the purposes of the trust, was made. The case was brought to this Court by writ of error, and decided in **86 United States, 526.**

In this Court the construction of the charter was not involved, nor was it insisted that the charter created a contract, but that the **employment** of the plaintiff created a contract, which, it was insisted, was violated by a subsequent act of the legislature declaring his position vacant. This Court held that the **terms of employment** contemplated the right of the legislature to terminate the employment, and that, therefore, no contractual rights were violated.

In **Thomas vs. Board of Trustees of Ilinois Industrlia University, 71 Illinois** 310, the Court held a mechanic's lien could not be enforced against the defendant's property, because it was a state institution, and its property owned by the State. No provision of its charter is shown which created a contract. No provision that its property should be forever used by the corporation for its charter purposes. There was no question of a diversion of the trust fund or a violation of its charter rights involved.

Spalding vs. People, 172 Illinois, p. 48, was a criminal case, and incidentally involved the discussion of the same university considered in the Thomas case just cited.

In **Regents vs. Board of Education, 4 Mich. p. 215,** the university in question was endowed and supported altogether by funds arising "from taxes and other public revenues";; the State appointed the professors, and their salaries were paid out of the State treasury. The act creating the institution expressly reserved the right to the legislature to repeal. or to modify its charter.

In **Regents vs. McConnell, 5 Nebraska 423,** the fund wsa entirely public. The act creating this institution did not confer any of the powers of a private corporation. It was not given the power of perpetual existence, and no provision was made either for private donations or that the fund should forever be devoted to the use of the corporation. In that case the Court expressly recognizes the distinction upon which we rely, and held that in that case the whole fund belonged to the public.

In **State vs. Knowles, 16 Florida 575, no** provision was made in the charter for private donations. Nor for the perpetual existence of the corporation, or the applicaton of ts fund forever to the purposes of the corporation. On the contrary, the officers and professors were to be paid out of the public funds; and no provision of the charter was shown to have been violated and no attempt made to divert the fund, but only to change the trustees who were to administer same.

In Governor vs. McEwen, 5 Humphrey 240, no contract was made in the charter that the corporation should exist forever, or that its funds should be forever held and used by the corporation. Among other things, the Court said:

> "It is not an attempt to divert the fund to improper uses, but merely surrender of a portion, in order to secure the balance."

This was entirely a **public fund** for common school education, and no provision of an alleged charter was violated. Again the Court said:

> "This constitutes an important difference between public and private corporations. The one is

> completely under the control of the legislature, and the other is not, because it is the creation of a contract between the State and private individual or individuals, which cannot be interfered with, without violating that provision of the Constitution which preserves the obligation of the contract."

Not one cent of this fund was ever contributed by private individuals. It came from the State and was owned by the state.

It will thus be seen that none of these cases have the slightest bearing on the question in controversy.

Adversary counsel attempt to draw a distinction between the case at bar and the case of **Vincennes University vs. Indiana, 14 Howard 269,** because in that case the act of Congress reserved, and the Secretary of the Treasury located, the property for the university, which was **afterwards** chartered and brought into being by the Territory of Indiana, and empowered by this charter of the State to take and to hold this property. Whereas, in the case at bar the act of Congress provided that the State should dispose of the property provided for the academy and sell the same for not less than two dollars per acre, and "the proceeds of the sales of the lands aforesaid shall be vested in funds for the respective uses aforesaid forever."

In the Vincennes case, the government set apart and selected the property and the State created the corporation and gave it power to hold and use the same. In the case at bar, the government conveyed the property in trust to the state, under an express contract that the state should sell the same and devote the proceeds to the use of the academy forever. We submit there is no essential difference between the principle involved in the two cases.

In the case of **Board of Education vs. Greenbaum, 39 Illinois 609,** and the **Board of Education vs. Bakewell, 122 Ilinois 339,** cited and discussed in our original brief, the title to the property ceded by the United States government had

been vested in the State and by the State sold, and the funds used for the benefit of the university, as provided for in the compact with the Federal government. And in that case it was held that this merely created a trust in favor of the university.

Adversary counsel attempt to distinguish these case from the case at bar by insisting that the university was originally established under its charter with **private funds,** and that as it was, **in its inception,** a private corporation, its character was not changed because the legislature afterwards contributed a part of this public fund to it.

The opinion of the Court in the first case shows that the compact with the Federal government was in 1818, and the corporation was not chartered until 1857. So that, at the time the corporation was brought into being, the fund that the state held in trust for it, was already in existence, just as in the case at bar Congress had passed the act, ceding the land to Tennessee for the use of this and other academies, but the Legislature had made no appropriaton and had passed no act for the benefit of these academies when this charter was granted. The charter on its face makes no provision for any endowment other than it provided for private donations and private subscriptions. So that in this case the corporation was, **in its inception,** purely private, without any provision having been made by the state for its endowment out of any public fund.

It is also insisted by counsel that in the case of **Downing vs. State Board of Agriculture of Indiana, supra,** the state had made no appropriation whatsoever for the corporation. Counsel overlook the fact that Sec. 8 of the charter of that corporation appropriated one thousand dollars from the State treasury for its support. And that the litigation was to recover appropriations made by the state for the benefit of the corporation. Thus that corporation was endowed and supported by appropriations from the State, and yet held to be a private corporation.

While counsel attempt to draw distinctions between the particular facts involved in the **Dartmouth College Case**, and the case at bar, the fact remains that the principles settled in that case are controlling in this case:

(a) That a public corporaion is either a governmental agency, chartered for political purposes, such as municipal corporations, or else one in which the State owns all the interests.

(b) Where the State charters a private eleemosynary institution, and provides that it shall exist forever, with the right to take property by private donation and by purchase, and hold the same in perpetuity,—this creates a private corporation, and a contract between the state and the **corporation,** and a contract between the state and the **donors**, and a contract between the state and the **beneficiaries**, that the corporation shall exist forever and **perpetually devote its property to the trusts provided for in the charter.**

In conclusion, we desire to call the attention of the Court to the case of the **Trustees of Montpelier Academy vs. George, 14 Louisiana 395.**

In 1883 the Legislature of Louisiana passed an act incorporating complainant, and appointing certain named persons as trustees. The act provided that the corporation should have authority to acquire properey by donation, purchase, etc.

The act provided also that the state should appropriate twenty-five hundred dollars per year for said academy. It also provided that the funds that had theretofore been appropriated for primary schools in the parishes of St. Helena and Livingston should be paid to the trustees of the corporation. The question as to whether the state could control this corporation was involved. The Court discussed very fully the difference between a public and private corporation, and after stating that the school building of the academy had been donated by one I. T. Preston, said:

> "The state stipulated with him through these trustees that his gift should inure to the benefit of the

academy and forever be administered by the persons named in that act or their successors, chosen as therein provided.

"It was clearly a contract entered into between the donor and the trustees, for the transfer and **perpetual security of the property, under the plighted.... faith of the state.**" *

The Court held that was a private corporation, and that the principles of the Dartmouth College case were in harmony with the principles of both the common and the civil law.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1906.

No. 159.

D. S. OSBORNE ET AL.,
TRUSTEES OF CARRICK ACADEMY,
PLAINTIFFS IN ERROR,

vs.

R. A. CLARK AND WINCHESTER NORMAL COLLEGE,
DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Tennessee.

MOTION, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

WILLIAM L. GRANBERY,
CHARLES C. TRABUE,
Solicitors for Defendants in Error.

BRANDON-NASHVILLE

Supreme Court of the United States.

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No. 159.

D. S. OSBORNE, ET AL., TRUSTEES OF CARRICK ACADEMY,

Plaintiffs in Error,

vs.

R. A. CLARK, AND WINCHESTER NORMAL COLLEGE,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

MOTION, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

May it please the Court:

This cause is here upon writ of error to the Supreme Court of Tennessee.

Motion.

Defendants in error, R. A. Clark and the Winchester Normal College, respectfully move the Court that this cause be dismissed, or affirmed, for the reason that no Federal question was raised or decided in the State Court.

The grounds of this motion are set out and discussed hereinafter on pp. 7, *et seq.*

STATEMENT OF THE CASE.

This suit was brought by Osborne and others, "as Trustees of Carrick Academy, of the County of Franklin, and in their own right *as citizens and taxpayers of said county*, and for and in behalf of the school children of said county, and in behalf of the citizens and taxpayers of said county."

The suit was tried below upon bill and demurrers.

The *sole question presented and determined below* was whether *a certain lease* of a school building by the Trustees of Carrick Academy (incorporated) to the Winchester Normal College (incorporated) was valid. The Court held it to be valid.

The lease was for fifty years, and was made and recorded *in 1881.*

The suit had been determined on, and the bil drafted before this lease seems to have been discovered by complainants. The bill avers at its close that "since the foregoing parts of the bill were drawn" complainants "have discovered" the existence of the lease; and they then aver its invalidity. (Rec., p. 13.)

The lease was in terms authorized by an Act of the Tennessee Legislature, being Chapter 63 of the Acts of 1881, as follows:

> SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Trustees of Carrick Academy are hereby *authorized** to lease the academy property to the Trustees of the Winchester Normal College for a period not exceeding fifty years.
>
> SEC. 2. *Be it further enacted*, That, *if the lease is made*,* it shall be the duty of the trustees of said college to keep the property in good condition and free from debt or encumbrance of any kind, and a failure to comply with these requirements shall render the lease null and void.
>
> SEC. 3. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

*Italics ours.

Specific objections to the constitutionality of this Act were stated in the bill. *All of these constitutional objections related to the Constitution of Tennessee.*

A brief resume of the origin and history of Carrick Academy is shown in the bill, and is as follows:

A certain dispute arose in 1799, after the admission of Tennessee into the Union, between Tennessee and North Carolina, regarding the right to dispose of vacant and unappropriated lands of the State. It was settled in 1806 by an agreement, to which Congress gave assent, which provided that the lands in Tennessee lying west and south of a certain line therein established should "be and remain at the sole and entire disposition of the United States," and that the United States thereupon ceded to the State of Tennessee all of its right and claim "to the territory of the lands lying east and north of the line hereinbefore established." (Rec., p. 8.)

A copy of this agreement is attached as "Exhibit 1" in an appendix to this brief.

It was provided in this agreement, among other things, that the State of Tennessee should set apart 100,000 acres of land "for the use of two colleges;" and another 100,000 acres in one tract "for the use of *academies*, one in each county in said State, to be established by the Legislature thereof;" and yet other lands for the use of common schools. (Rec., pp. 8, 9.)

The Tennessee Legislature in 1806, and in pursuance of this provision relating to academies, incorporated an academy for each county of the State, and in 1809, when Franklin County was created, incorporated the "Trustees of Carrick Academy for the County of Franklin," and invested it with the same powers and authorities that had been given to the other county academies. A copy of the Act establishing the first academies, and a copy of the Act establishing Carrick Academy, are attached as "Exhibits 2" and "3" in the appendix. (Rec., p. 9.)

The Trustees of Carrick Academy "acquired" a tract of land in the town of Winchester, and established a school, and "*with its pro rata of the funds arising from the sale of the academy lands, and other sources,*" conducted the school "until the fund arising from the sale of the academy lands had been *exhausted,*" which was some time prior to the Civil War. (Rec., p. 9.)

After the war the building was used as a public school, and when not so used was leased to individuals to be used, and was used, *for private schools*, until the year 1870. (Rec., p. 10.)

In 1870 the defendant Clark obtained possession of the property, and since then has used it *for school purposes* under leases, and is now in occupation of it under *a lease made by Carrick Academy in 1881* to the Winchester Normal College, of which latter institution Clark is averred to be the sub-lessee. (Rec., pp. 10, 11.)

This lease of 1881 to the Winchester Normal College was *in writing*, and was duly *recorded*. (Rec., pp. 14, 15.) It is this lease that is attacked.

Under its original charter, the *Trustees of Carrick Academy and of the other county academies were appointed* from time to time *by the State Legislature*, but by a subsequent Act this power of appointment was vested in the several county courts. (Rec., p. 10.)

Plaintiffs in error were made Trustees of the Carrick Academy by the county court in 1902, *twenty-one years after* this lease had been made and recorded. During all of this time defendants in error had been in possession. (Rec., p. 12.)

The *prayer of the bill* was that the lease be declared invalid, and for "a sale of the academy property," and that the proceeds arising therefrom "be paid *into the treasury of the County of Franklin*, for the benefit of the school fund." (Rec., p. 14.)

The *demurrers* of defendants presented the questions that the suit was barred by the statutes of limitation; that plaintiffs

in error were estopped to sue; and that the lease had ample authority in the original charter and in the Act of 1881. (Rec., pp. 16, 17.)

In March, 1904, the cause was heard on appeal by the Supreme Court of Tennessee. *That Court held the lease to be valid, and dismissed the bill.* (Rec., p. 23.)

Three facts appear in the record that are proper to be borne in mind in considering this case. They are:

1st. That the support provided for Carrick Academy was *exhausted prior to the Civil War,* and that when the Act of 1881 was passed the academy was *moribund.*

2d. That the purpose of the Act and of the lease was to preserve Carrick Academy *to the cause of education* in the best way that was practicable—to lease it out for educational purposes; and

3d. That the object of this suit is *to destroy the identity of the Academy,* by selling it and disposing of its proceeds.

In this Court it is now assigned as error that the Supreme Court of Tennessee should have held the Act of 1881 to be unconstitutional on the ground that it impaired the obligation of a contract—the contract referred to being the charter of Carrick Academy.

BRIEF AND ARGUMENT.

On behalf of defendants in error it is respectfully submitted:

I. On Motion to Dismiss. That this Court is *without jurisdiction* of the cause, for the reason that the question of the unconstitutionality of the Act of 1881, as impairing the obligation of a contract, was not raised or decided in the State Court.

II. On the Merits. That the Act of 1881 does not impair the obligation of any contract, for the reasons:

(A) That the obligations of the charter of Carrick Academy, *if the charter was a contract*, were not impaired, because:

(1) Carrick Academy *already had*, under its original charter, the fullest powers of disposition of its property; and,

(2) The Act of 1881 was *not in its nature such an Act as could impair* the obligation of a contract. At the most, it merely conferred a power on the corporation, to be exercised or not, at its will. It impaired no contract obligation; and,

(3) If the Act of 1881 might otherwise have impaired any contract obligation, yet it was *assented to and acquiesced in and acted under* by Carrick Academy *for more than twenty years* prior to the institution of this suit, so that the corporation cannot now be heard to complain.

These reasons are applicable *upon the theory* contended for by plaintiffs in error, that the Trustees of Carrick Academy was *a private corporation*, and that its charter was therefore a contract which the State might not impair. But it is confidently asserted by defendants in error:

(B) That the Trustees of Carrick Academy was *a public corporation*, and that it was therefore subject to such governmental regulation as was contained in the Act of 1881.

I.

MOTION TO DISMISS.—NO FEDERAL QUESTION.

The Federal question sought to be presented here is whether or not Chapter 63 of the Acts of 1881 violates Section 10 of Article 1 of the Federal Constitution, inhibiting the States from passing "any law impairing the obligation of contracts."

This is *the only Federal question* insisted upon by plaintiffs in error.

Was this Federal question raised and decided by the Tennessee Supreme Court in this case?

This Court has repeatedly said that it was without authority to review the decision of a State Supreme Court, unless it *affirmatively* appeared that a Federal question was *actually raised and actually decided;* or, to state it a little differently, unless it appeared that the decision of a Federal question was necessary to the conclusion reached by the State Court.

Murdock v. *Mayor, etc., of Memphis,* 87 U. S., 590; 22 L. Ed., 449.

Detroit City Ry. Co. v. *Guthard,* 114 U. S., 133; 29 L. Ed., 118.

Ex parte Spies, 123 U. S., 131; 31 L. Ed., 80.

Brooks v. *Missouri,* 124 U. S., 394; 31 L. Ed., 454.

Cox v. *Texas,* 202 U. S., 445; 50 L. Ed., 1099.

Adams County v. *Burlington, etc., R. R. Co.,* 112 U. S., 123; 28 L. Ed., 678.

Simmerman v. *Nebraska,* 116 U. S., 54; 29 L. Ed., 535.

Leeper v. *Texas,* 139 U. S., 462; 35 L. Ed., 226.

Bushnell v. *Crooke M. & S. Co.,* 148 U. S., 688; 37 L. Ed., 612.

Loeber v. *Schroeder,* 149 U. S., 585; 37 L. Ed., 859.

Powell v. *Supervisors,* 150 U. S., 439; 37 L. Ed., 1136.

Hale v. Akers, 132 U. S., 554; 33 L. Ed., 442.

In the case of *Murdock* v. *Memphis, supra,* it is said:

> "It is essential to the jurisdiction of this Court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the Act must have been raised, and presented to the State Court."

The other cases cited reiterate this principle.

And it is not sufficient that the Federal question might have been raised. As said in *Murdock* v. *Memphis:*

> "Nor is the mere existence of such a question in the case sufficient to give jurisdiction—*the question must have been decided in the State Court.*"*

In *Crowell* v. *Randell,* 10 Peters, 398; 9 Law Ed., 470, it is said:

> "It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it *did arise,** and was applied by the State Court to the case."

Chouteau v. *Gibson,* 111 U. S., 200; 28 L. Ed., 400:

> "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must *appear affirmatively** on the face of the record, not only that a Federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

(*a*) *The Record Proper.*

The record proper in this case does not show that a Federal question was ever presented in the State Court.

The pleadings consisted of a bill and demurrers thereto. There was no evidence.

*Italics ours.

The bill refers specifically to the Act of 1881, and avers its unconstitutionality. The grounds are stated *seriatim* on page 13 of the record.

Where constitutional objections are pointed out, specific reference is made *in each instance to the Constitution of Tennessee.*

One or two other objections which are apparently intended to be constitutional make no reference to either the State or Federal Constitution, but under the well settled doctrine of this Court they will be conclusively presumed to have referred to the State Constitution.

Porter v. *Foley*, 65 U. S., 415; 16 L. Ed., 740.
Miller v. *Cornwall R. R. Co.*, 168 U. S., 134; 42 L. Ed., 411.
Capital City Dairy Co. v. *Ohio*, 183 U. S., 248; 46 L. Ed., 176.

(*b*) *The Petition for Writ of Error.*

The case at bar was tried and decided by the Tennessee Supreme Court on March 19, 1904. Nearly two years thereafter, on November 20, 1905, plaintiffs in error filed their petition for a writ of error, to bring the case into this Court. In this writ of error, *for the first time*, it is averred that a Federal question was presented and determined in the State Court.

The writ of error was granted by the Chief Justice of the Tennessee Supreme Court. No certificate from him seems to have been asked, and none was given. He merely directed that the "writ of error issue as prayed." (Rec., p. 2.)

It is settled that the averment in a petition for writ of error that a Federal question was raised and decided in the State Court is *insufficient* in itself to give this Court jurisdiction.

Leeper v. *Texas*, 139 U. S., 462; 35 L. Ed., 226.
Adams County v. *Burlington, etc., R. R. Co.*, 112 U. S., 123; 28 L. Ed., 678.
Cox v. *Texas*, 202 U. S., 445; 50 L. Ed., 1099.

This Court stated the facts in the case of *Leeper* v. *Texas*, *supra*, as follows (35 L. Ed., 226):

> "A petition for a writ of error from this Court was then presented and allowed by the presiding judge of the Court of Appeals. The petition set up, in substance, the same grounds which subsequently appeared in the assignment of errors, and averred that upon the trial there was 'drawn and called in question the construction of certain clauses of the Constitution of the United States, and the decision of said cause was adverse and against the rights, privileges, immunities and exemptions so especially set up and claimed under those clauses of the said Constitution of the United States.'"

The Court said (p. 227):

> "It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. *Manning* v. *French*, 133 U. S., 186 (33:582); *Clark* v. *Pennsylvania*, 128 U. S., 395 (32:487); *Warfield* v. *Chaffe*, 91 U. S., 690 (23:383); *Butler* v. *Gage*, 138 U. S., 52 (34:869). That to give this Court jurisdiction to review the judgment of a State Court under Section 709 of the Revised Statutes, because of the denial by the State Court of any right, title, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way. *Spies* v. *Illinois*, 123 U. S., 131, 181 (31:80,91); *Baldwin* v. *Kansas*, 129 U. S., 52 (32:640); *Chappell* v. *Bradshaw*, 128 U. S., 132 (32:369)."

So much for the petition.

(c) *Opinion of the State Court.*

There remains to consider *the opinion* of the Tennessee Supreme Court.

In instances this Court has looked to the opinion of the State Court to ascertain whether a Federal question was raised and decided by that Court.

In *Murdock* v. *Memphis, supra,* the Court, while recognizing this practice, says:

> "But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, *its record,* whether it be a case in law or equity, *must be the chief foundation of the inquiry;** and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

Where the record proper fails, as it does in this case, to show that a Federal question was raised, and it is sought to *infer* the presence of this question from the opinion alone, it must clearly and affirmatively appear in the opinion that the question was decided, and that it was necessary to the conclusion announced by the Court.

The opinion of the Supreme Court of Tennessee is contained on pages 30 *et seq.* of the record.

There is no reference in this opinion to any Federal question, unless it is *inferred* from the fact that the Supreme Court, in discussing the point of whether the corporation styled "Trustees of Carrick Academy" was a public or a private corporation, referred to the case of *Dartmouth College* v. *Woodward,* 4 Wheat., 519; 4 L. Ed., 629.

There is nothing in this opinion other than this reference to the Dartmouth College case to indicate that the Supreme Court was considering the validity of the Act of 1881 with reference to the contract clause of the Federal Constitution.

On the contrary it will be seen that *the court was discussing the constitutionality of that Act with reference solely to the State Constitution.*

*Italics ours.

One of the grounds of unconstitutionality alleged in the bill being Par. XIV, Sec. 7 (Rec., p. 13), is as follows:

> "7. Because said Act is in violation of Sec. 8, Art. 11, of the *Constitution of Tennessee*, which inhibits the passage of any law for the benefit of individuals inconsistent with the general laws of the land, or to pass any law granting any individual or individuals rights, privileges or immunities other than such as may be by law extended to any member of the community who may be able to bring himself within the provision of such law, and said Act is particularly in conflict with that part of the provision of the Constitution which prohibits the Legislature from increasing or diminishing by *special laws* the powers of a corporation."

The well settled construction given this provision by the State Courts was that it inhibited the passage of a special Act enlarging the charter powers of a private corporation, but *that it had no application to public corporations.*

Ballentine v. *Mayor, etc., of Pulaski*, 15 Lea (Tenn.), 637.
Williams v. *Nashville*, 89 Tenn., 490.
Reelfoot Lake Levee District v. *Dawson*, 97 Tenn., 177.

It was earnestly insisted by plaintiffs in error in the State Court, *under this constitutional objection,* that the Trustees of Carrick Academy was a private corporation, and that the Act of 1881, being by its terms a special Act applicable alone to this corporation, was obnoxious to this clause of the State Constitution.

By defendants in error it was there insisted that the corporation was a public corporation, and that, therefore, the Act was not within the inhibition of the clause referred to.

It was apparent that if Carrick Academy was a private corporation, the Act was amenable to this constitutional objection, and, the other objections being unimportant, *the case narrowed down to a determination of this matter.*

In *Davis* v. *State*, 3 Lea (Tenn.), 378, it was said:

> "They who insist upon the unconstitutionality of an Act must point out the specific provision of the Constitution which is violated."

No point was made that the Act violated the Federal Constitution.

The State Supreme Court was, therefore, considering the objection raised in the bill that the Act violated the Tennessee Constitution in the respect just pointed out, when it made use of the following language in its opinion (Rec., p. 39):

> "The predicate upon which the complainants rest their attack upon the Act authorizing the lease to Winchester Normal College is that Carrick Academy was a private corporation. . . .
>
> "In order to determine whether this assumption is sound, it is necessary to ascertain briefly the nature of corporations."

The Court in its opinion then considers the subject of public and private corporations, in the course of which it refers to the Dartmouth College case as a case which distinguished and defined the characteristics of these two classes of corporations, and concludes (Rec., p. 43):

> "We hold that this corporation was a public agency under the control of the State, and that the Act of the Legislature under which the lease of its property to the Winchester Normal College was made in 1881 was constitutional."

The language throughout the opinion is entirely appropriate to a discussion of this objection raised under the State Constitution, and which was sharply asserted in the pleadings.

Whether the State Court decided this question correctly will not be a subject of inquiry in this Court.

De Saussure v. *Gaillard*, 127 U. S., 216; 32 L. Ed., 125.
Hale v. *Akers*, 132 U. S., 565; 33 L. Ed., 446.

The record, even with the aid of the opinion of the State Court, ails to show *affirmatively* that any Federal question was "actually raised and actually decided."

It is earnestly submitted that the State Court *has never considered* the question sought to be raised in this Court, and that plaintiffs in error are now for the first time seeking to present it.

For this Court to assume jurisdiction now will not be to review the action of the State Court, but *to re-try here upon a new legal issue.*

For the reasons stated, defendants in error ask that the writ of error be dismissed.

II.

THE ACT DOES NOT IMPAIR THE OBLIGATION OF ANY CONTRACT.

This question cannot arise unless it shall be found that Carrick Academy was a private corporation. Its character in that respect will be discussed presently.

However, assuming first, for the purposes of argument, that it was a private corporation, it is submitted (1) that the corporation already had the power to make this lease; (2) that the Act affected nothing without the consent of the corporation; and (3) that the Act was assented to by the corporation.

There are always two questions to be considered in a case of this sort:

(A) Is the charter a contract? and
(B) If so, has it been impaired?
Dartmouth College v. *Woodward*, 4 Wheat., 650, 656.
We shall consider the latter question first.

A.

The Charter, if a Contract, was not Impaired.

(1)

Carrick Academy Already Had Power to Make this Lease.

The Act assumed to confer on the corporation the right to lease its property to the Winchester Normal College. The corporation already had this right. In the Act incorporating it, it was empowered:

> "To purchase, receive and hold, to it and its successors forever, any lands, tenements, rents, goods or chattels, which shall be given or devised to, or purchased by it for its use; *and to sell and dispose of the same in such manner as to it shall seem most advantageous.*" (Appendix, p. 44.)

The above clause in italics is omitted in the brief of plaintiffs in error, where they undertake to set out the charter in full, and they inadvertently fail to indicate the omission. (Brief, pp. 2, 3.)

The bill in this cause specifically averred that:

> "By the Act incorporating the academy the exclusive power and authority to dispose of its property was vested in the trustees, which has never been changed, altered or amended in any respect whatever."

It is a general principle of law that "in the power to dispose of is included the power to make leases."

Coal Creek, etc., Co. v. *Tennessee Coal Co.*, 106 Tenn., 667.
Morawetz on Corp., Vol. 2, Sec. 1121.

Accordingly the Act of 1881 *neither added to nor diminished* the contract rights and powers of Carrick Academy.

(2)

The Act Intrinsically Not Operative to Impair.

It is submitted that intrinsically the statute in question could not have impaired the obligation of the contract.

The statute does not act upon the contract. It does not impair its efficiency. It does not alter, either by diminishing or by augmenting, the respective obligations of the State and the corporation created by the charter.

By its express terms the Act assumed only to "*authorize*" the making of the lease, and to provide that, "*if the lease is made*," the *lessee* should keep up the property.

The Act took away no rights or property of the corporation. It *authorized* the corporation to do a certain thing. The doing of that thing was dependent upon the will of the corporation.

The Act neither directed nor prohibited the doing of anything.

Planters Bank v. *Sharp*, 6 How., 301; 12 L. Ed., 447:

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished."

To this the Court, in *Edwards* v. *Kearsey*, 96 U. S., 595; 24 L. Ed., 796, adds:

> "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account."

The Act in question here was no encroachment. It did not diminish the value of any contract right.

(3)

Carrick Academy Accepted the Provisions of the Act.

An Act will not be held to have impaired the obligation of a contract where it has been assented to by the party complaining.

This Act was passed in 1881. Thereupon the trustees united in making the lease authorized by the Act, thus expressing their *assent* to it, in the strongest way.

Thus matters stood until the filing of this bill some *twenty-one years thereafter*.

In the *Pennsylvania College Cases*, 80 U. S., 190; 20 L. Ed., 552, an Act of the Legislature of Pennsylvania *authorizing* the union of Washington and Jefferson Colleges was objected to as impairing the obligation of the charter contract, the two institutions having been theretofore separate corporations.

It appeared that, subsequent to the passage of the Act, the two corporations had *assented* to it, and had availed themselves of the *authority* thereby conferred.

This Court expressed the opinion that the charters in question were such as to reserve in the State the right to alter or amend them, and proceeded:

> "Suppose, however, the fact were otherwise; still the respondents must prevail, as it is admitted that the complainants accepted the Act passed to unite the two colleges, and to erect the same into one corporation."

Again, in the same case, this Court said:

> "Such amendments, alterations and modifications may, as a general rule, be made by the Legislature, *with the assent of the corporation*,* even in cases where the charter is unconditional in its terms, and there is no general law of the State containing any such reservation."

In *Regents* v. *Williams*, 9 Gill & J., 365; 31 Am. Dec., 103—a case cited and relied on by plaintiffs in error—it is said:

> "The passing of it, with nothing more, amounts to an offer only for acceptance; and if afterwards accepted, either expressly *or by acting under it*,* it then receives life and becomes an operative law."

Here the lease, by way of preamble, set out the Act of 1881 in terms, and recited that it was made under the authority of that Act. (Rec., pp. 14, 15.)

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*Italics ours.

B.

Charter of Carrick Academy was not a Contract.

The answer to this question depends upon whether Carrick Academy was a public or a private corporation.

This academy was one of a system of academies established by the State a century ago, in furtherance of an educational plan agreed on between the Federal Government and the State of Tennessee. The State entered into a compact with the government that it would employ the proceeds derived from the sale of some of the public lands *vested in the State* to the establishment and maintenance of this system of academies.

It was entirely within the power of the State to determine whether these academies should be private corporations or should be agencies of the State. There was nothing in the compact governing this matter, and indeed the compact seemed rather to contemplate that the academies should be State institutions.

There is no reason and no authority sustaining the view that a State, designing to establish a system of educational institutions under a compact such as this was, is under any obligation to constitute them as private corporations.

The State of Tennessee conceived that the better method would be to establish these county academies as State agencies, and to govern and control them as such; *and this was within its right to do.* The origin of the academies was governmental, they were intended *solely to further the educational interests of Tennessee,* and there was nothing in the inception of them that suggested any of the incidents of a private corporation.

This was not like the Dartmouth College case, where individuals were applying to the State for a charter, and where private funds had been accumulated in advance of the incorporation of the institution.

In this case the State selected individuals in each of its counties, and *solicited them* to become trustees of the several local academies. These trustees were neither required nor expected to contribute their personal means to the funds of the institution. They were not expected nor permitted to have any personal or private interest in the institution other than that which all good citizens should have. In other words, *it was a public duty that they were called upon to perform at the instance of the State.*

While they were authorized to receive gifts and contributions from private sources, yet such gifts and contributions were *no part of the original endowment* of these academies. The charter was not conferred for the purpose of administering a private endowment, as in the case of Dartmouth College; but, on the contrary and differing from that case, private means, if they were contributed for the benefit of the academies, were given after its incorporation as a public institution, and with the knowledge that it had been so incorporated.

In other words, just as public funds or public lands may be bestowed upon a private corporation so as to be beyond recall, and so as not thereby to confer any right on the State to control such corporations, so also private funds may be bestowed upon a public corporation, and it will not follow that private interests and rights of control arise therefrom.

The question of whether a corporation is a public or a private corporation is one that is determined *when it is incorporated*, and is dependent upon the circumstances attending the founding of the corporation, the source from which it at that time derives its means, and upon the intention of the State and of the incorporators, and upon the right of control and government, as vested by its charter.

Carrick Academy had its inception in the State. It was *established* by the State. It was to derive *its means* primarily from the State. It was *a part of a public system* extending

throughout the entire State, and it was, by its charter, *to be governed and controlled* by the State.

There was *no right of perpetual succession in its trustees.* Its charter provided as follows:

> "Upon the death, resignation, or other legal disability of any of the said trustees hereby, or which may be hereafter, appointed, the vacancy thereby occasioned shall be supplied *by the next or any succeeding General Assembly*, after such vacancy may occur, but may, nevertheless, be supplied by the remaining trustees, or a majority of them, until such vacancy or vacancies shall be supplied by the Legislature, as aforesaid." (See Appendix, p. 45.)

Again, the charter prescribed that judgment for failing to account for moneys received might be had against the treasurer, "on motion in any court of record in this State, and execution may thereupon be awarded *in like manner as against sheriffs* for the non-payment of public taxes." (Appendix, p. 46.)

The appointment of trustees by the Legislature for these numerous academies proving inconvenient, the power was by legislative Act bestowed upon the county court, another governmental agency, which, by the terms of the Act, should "have the same power and authority *as if the appointment had been made by the Legislature* of this State."

Acts of 1817, p. 136, Sec. 1; *Scott's Laws of Tennessee*, Vol. 2, p. 393.

These county academies did not have their origin in applications for charters from private citizens, made for the purpose primarily of administering funds contributed from private sources.

These county academies have throughout been *treated as public governmental institutions*, just as have been the University of Tennessee, the State Asylums for the Insane, the Tennessee Blind School, and the Tennessee Deaf and Dumb School, all of which operate under charters, for all of which the State appoints

trustees, and to all of which the State makes biennial appropriations. It was so with the common school system in the earlier history of the State. *Governor* v. *McEwen*, 5 Hum. (Tenn.), 241.

Thus the Code of Tennessee, adopted in 1858 (the only Code that has been adopted by the Legislature), under Title 7 of "Education," treats, Chapter 3, of "Common Schools;" Chapter 4, of "County Academies;" and Chapter 5, of "Colleges and Universities." Each of these three grades belongs to and is a part of one general system.

The opinion of the State Court in this cause refers to the fact, as evidencing the idea of the State that these academies were public governmental institutions, that the State had passed *some fifty or sixty private Acts*, each disposing or authorizing the disposition, in one way or another, of one of these county academies. These dispositions were made after the funds for the support of the academies had been exhausted, and in each instance the purpose of the disposition was *to further the cause of education* in the county where the particular academy was located. This was done sometimes by lease or transfer to another local school, as in the case of Carrick Academy, and oftentimes by turning the academy or its proceeds over to the common schools.

This suit presents the peculiar situation of trustees who are in a legal view *appointees of the State*, who have been authorized by the State to do a certain thing, who have then done that thing, and who are now claiming that the thing must be undone because the State had no right to confer such authority on them, and because they had no right to act under such authority.

Plaintiffs in error *are asserting* "in their own rights as citizens and taxpayers of Franklin County, and for and on behalf of the school fund, and of the school children, as well as *on behalf of the citizens and taxpayers of Franklin County*," that Carrick Academy is a *private corporation*, and are asking that the Court

decree a sale of the property of this private corporation, and that the proceeds "be paid into the treasury of the County of Franklin for the benefit of the school fund."

CASES CITED BY OUR ADVERSARIES.

The Dartmouth College Case, 4 Wheat., 518.

An examination of this case will show that the very reasons emphasized there as characterizing Dartmouth College as a private corporation conclusively establish that Carrick Academy was a public corporation.

Dartmouth College was merely *the continuation of a private eleemosynary institution* which had previously existed for a number of years, and which it was thought best to incorporate with a view of enlarging it, adding to its endowment, and increasing its usefulness. There was about it no one of the elements hereinabove referred to as establishing that Carrick Academy was a public corporation.

Chief Justice Marshall says:

> "From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted *entirely of private donations.*"*

Again he says:

> "The origin of the institution was, undoubtedly, the Indian charity school established by Dr. Wheelock, *at his own expense.* It was *at his instance* and to enlarge this school that contributions were solicited in England. . . . The charter of incorporation was granted *at his instance.*"*

Another quotation from his opinion is as follows:

> "*The particular interests of New Hampshire never entered into the minds of the donors,** never constituted a motive for their donation. The propagation of the Chris-

*Italics ours.

tian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her."

And again, he says:

"Its trustees or governors were originally named by the founder [Dr. Wheelock], and *invested with the power of perpetuating themselves.*"*

The distinguished Chief Justice thus reached his conclusion that Dartmouth College was a private institution, for the following reasons:

(1) Its funds consisted entirely of private donations.

(2) Its founder was a private person.

(3) The charter was granted at his instance.

(4) The particular interests of the State incorporating it never entered into the minds of the donors.

(5) Its trustees were self-perpetuating.

With respect to each one of these features Carrick Academy presents the converse condition. This has already been pointed out.

The opinion in the Dartmouth College case expressly recognizes that the character of civil institutions grows out of "*the manner* in which they are formed, and *the objects* for which they are created."* Continuing, the Court says:

"The right to change them is not founded on their being incorporated, but on their being *the instruments of government created for its purposes.** . . . The incorporating act neither gives nor prevents this control."

*Italics ours.

The Court says:

> "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or *if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions*, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States."*

Within the full meaning of this authoritative definition, Carrick Academy was a public corporation.

Vincennes University v. Indiana, 14 How., 269; 14 L. Ed., 416.

This case seems to be relied on as establishing, by analogy, that the compact between Tennessee and the Federal Government prevented the possibility of these academies being State institutions.

In this case—which was decided by a divided court—it was held that Vincennes University was a private corporation, and that the State had no right to assume control over its property.

It appeared that Congress had *reserved* from the public lands of the territory, which was afterwards formed into the State of Indiana, a certain portion "to be located by the Secretary of the Treasury," for the use of a seminary of learning. *The Secretary thereupon located the property*, and the territorial Legislature incorporated Vincennes University.

A majority of the Court was of opinion that the reservation by Congress held the title to the property selected by the Secretary in abeyance, and that upon the incorporation of Vincennes University the title at once vested in that institution. It was therefore held that the title to this property had *never been in the State*, so that there was no basis whatever for the claim of State control.

*Italics ours.

It was further claimed, on behalf of the State, that if title had not vested in it as a Territory, yet it did thereafter vest in it under a section of the Act admitting the State into the Union, as follows:

> "That one entire township, which shall be designated by the President of the United States, in addition to the one heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the Legislature of the said State, to be appropriated solely to the use of such seminary by the said Legislature."

The Court held that the very words of this Act indicated that it was only the additional township that was to vest in the State, and that the township originally selected and turned over to Vincennes University was not so to vest.

Of this section Chief Justice Taney, in his dissenting opinion, says that "it appears plain to me that this township, as well as the additional one, are both granted to the State by Congress."

The Court, in the majority opinion, further says:

> "This corporation had no political powers, and could in no legal sense be considered as officers of the State; *they were not appointed by the State.*"

The majority of the Court rests its conclusion of law that the university was not a public corporation upon its conclusion of fact that the property had never at any time vested in the State. The minority arrived at the opposite conclusion of fact, and in consequence concluded that the university was a public corporation. *The determining consideration was whether the property had ever vested in the State.*

In the case of Carrick Academy the lands were not bestowed by the Federal Government, but such right and interest as the government had in them were expressly *"ceded and conveyed to the State of Tennessee,"* and it was an express provision in the

agreement that Tennessee should set apart lands for the academies, and that these lands should be *"subject to the disposition of the Legislature of he State."* (Appendix, pp. 40, 42.)

For the very reason which controlled the decision of the Vincennes University case, it must result in this case that Carrick Academy was a public corporation.

Regents v. Williams, 9 Gill & J., 365; 31 Am. Dec., 72.

It is sufficient to say of this case that it was expressly found by the Court that "the State was not the founder in the sense of that term as applied to corporations;" and that the State "gave to it in its creation the capacity to acquire and hold property, but *made to it no donation;*" and that the corporation in question *was conceived by private persons;* and that it was *established by private funds;* and that its governing body was *self-perpetuating.*

In these respects it was like the case of Dartmouth College, and in all of them wholly unlike the case of Carrick Academy.

Trustees of New Gloucester v. Bradbury, 11 Maine, 118.

In this case certain property had been granted by Massachusetts to the town of New Gloucester, for the use of schools. The grant was absolute, and "the sovereign power then had no further control of the lands." Thereafter by an Act of the Legislature, *"passed by the consent and upon the application of the town,"* a corporation was created, and it was directed that the lands be sold, and the proceeds "placed under the exclusive management and control" of the corporation, whose trustees were given *the right of perpetual succession.* Thirty years thereafter, and again at the instance of the town, the Legislature undertook to legislate the trustees of the corporation out of office, and to empower the town to elect trustees from time to time.

The latter act was declared unconstitutional upon the ground that the fund had been voluntarily turned over to trustees, to

whom was given the right of perpetual succession, and over whom the town had reserved no right of control.

Allen v. McKean, Fed. Cas. No. 229, Vol. 1, p. 489.

Here the Legislature had incorporated certain trustees of Bowdoin College *with the right of perpetual succession*, and had vested certain townships of land "in the trustees of the college, and their successors forever, for the use, benefit, etc., of the college, with power to dispose of them," etc.

Large funds were also contributed to the college from private sources. Thereafter the Legislature undertook to make radical changes in the charter, among which was one legislating the president out of office.

It did not appear that the college was intended to be a State institution, or that the State had reserved any right of control over it, or that it was to derive its maintenance from the State, and the only fact affording any color to the claim that it was a public corporation was that the State had made it a gift of certain lands. The fact that its trustees were made self-perpetuating negatived the idea that the State intended to reserve any rights of control. The Court held that Bowdoin College was thereby created as a private corporation, and that the Legislature "could not resume their grant."

Yarmouth v. North Yarmouth, 34 Maine, 411.

This case is quite similar to that of the trustees of Gloucester, *supra*. It was a case where a town owning certain lands caused them to be sold and the proceeds turned over to a corporation, to be administered for school purposes. This was a matter entirely between the town and the corporation, and was done with the town's assent. Thereafter, and *over the objection of the town and the corporation*, the Legislature undertook to make a division of this school fund, and to require the corporation to surrender a portion of it. The Court held that there was no warrant for this assumption of State control.

Board of Education v. Greenebaum, 39 Ill., 609.
Board of Education v. Bakewell, 122 Ill., 339; 10 N. E. 378.

In both of these cases the Illinois Court was considering the legal status of a certain normal university.

It appeared that this university had been originally established under its charter *with private funds*, and that it was not then intended to be a State institution, or to be supported by State funds. It was, therefore, *in its inception a private corporation*, and the Court was properly of the opinion that its character in this respect was not altered because of the mere fact that thereafter the Legislature assumed to consider it a State institution, and made appropriations for it. The Court found that a certain county in the State pledged funds amounting to $160,000 for a site and building, and that this gift was accepted, and that the school was "erected, not at the expense of the State, but of individuals;" and that this donation "was a free gift by charitable individuals *to the corporation, not to the State.*"

These decisions merely illustrate what has heretofore been pointed out, that, under certain circumstances, a State may, at its election, establish a certain institution as a public agency, or as a private corporation; and that, where it was originally made a private corporation, the mere gift to it thereafter of public funds will not, without its consent, alter its character, so as to subject it to the control of the State.

In the case of Carrick Academy it affirmatively appears from the bill that it was maintained "with its *pro rata* of the funds arising from the sale of *the academy lands*, and other sources," until compelled to discontinue because "the fund arising from the sale of the academy lands had been exhausted;" and that during the period of its operation it was under "*the fostering care of the State*" (Rec. p. 9). It does not affirmatively appear that any gifts were made to it from private sources, but if there were any they were made to it after it had been established as a public corporation.

Downing v. Indiana State Board of Agriculture (Ind.), 12 L. R. A., 664.

In this case it appeared that the State had incorporated an agricultural body, giving its trustees the right of perpetual succession, and without making to it any appropriation whatsoever. The Court found as a fact that its funds had been received *from private sources*, and that it was intended to be, and was, a private corporation, and not a State agency.

OUR AUTHORITIES.

The proposition for which we are contending is that where the origin of an educational institution is governmental, and where it is to be one of a system of similar institutions provided by the State for each of the counties thereof, and where it is to derive its maintenance from a common fund provided by the State, to be held and administered by the State for the common use and benefit of all these institutions, and where the State proposes to appoint the governing body of the institution, and to reserve to itself the right to fill all vacancies therein—that where these are the conditions attending the establishment of an institution, *the State has the right to determine whether the institution shall be a public or a private institution*, and that when this has been determined, then, as was said in the Dartmouth College case, the mere fact that a charter was granted to it will not alter its character in this respect.

These were the conditions attending the founding of Carrick Academy. From what has been said of its origin and history it is evident that the State intended to establish it as a public educational agency, and as public agencies it and the other county academies have for a century been uniformly regarded by the Legislature and courts of Tennessee.

Reference has already been made to the fact that the Tennessee Legislature has, during the last fifty years, by special Acts, made disposition of *some fifty or sixty* of these county academies, such disposition being always in furtherance of the cause of education.

In its opinion in the case at bar, the Supreme Court of Tennessee, speaking through Chief Justice Beard, said (112 Tenn., 496, Rec. pp. 40–41):

> "It was purely one of the educational agencies of the State, created for the diffusion of knowledge in the various communities where located. The legislation out of which sprang this and the other academies of like nature, however crude, was the first effort of the State to bring education to the door and within the means of every citizen of the commonwealth. It was the beginning of a long series of efforts, which were often abortive, but as often renewed, to establish a public school system in the State; and that which we have to-day can be historically traced to the initial Acts of 1806 and 1809.
>
> "Being public agencies established by the State to subserve a public purpose, we see no more reason to doubt the power of the Legislature to pass the Act in question than to enact legislation to create and destroy municipalities, and to exercise control at its pleasure over the various benevolent institutions and their properties established throughout the State."

Governor v. McEwen, 5 Humph. (Tenn.), 241.

The opinion in this case was rendered by one of the greatest of Tennessee's judges, Judge Turley. The case is strikingly analogous to the one at bar, and is very fully reported. It declares the status of a State educational corporation, and the right of the Legislature to control it, and the property entrusted to it.

In 1836 the Legislature created a body politic and corporate by the name and style of "The Board of Commissioners of Common Schools," with authority to "hold and possess property of any kind in trust for the use of common schools," etc. The corporation was to be composed of the State Treasurer, the State Comptroller, and the State Superintendent of Public Instruction, the latter being made the executive officer.

It will be recalled that provision was made for the common schools in the same compact with the Federal government in which provision was made for the county academies, and the fund involved in this opinion is referred to as *the college and academy fund*, as well as the school fund.

McEwen was Superintendent of Public Instruction, and the suit was brought to recover a certain portion of these funds alleged to have been lost by want of proper care and prudence on his part. While the suit was pending, the Legislature appointed commissioners, with authority to compromise it, and a compromise was agreed on. The question was thus sharply presented whether the Legislature had the power to adjust a claim in favor of this corporation. The determination of this question depended on whether the corporation was public or private.

It is apparent that the corporation styled "The Board of Commissioners of Common Schools," under consideration in this case, was *very similar in its status and attributes to the several county academy corporations*. The same contention that the corporation was private was made in that case, and the same arguments were brought forward in support of that contention that are adduced here.

The Court considered the matter exhaustively and held that the corporation was *a public agency*, and as such under the control of the Legislature. The Court said (pp. 287, 288):

> "The General Assembly has thought proper to incorporate the Board of Commissioners for Common Schools, as a matter of convenience, not that the Constitution directed it, and has authorized them, as a body corporate and politic, to hold and possess property of every kind in trust for the use of common schools, to sue and be sued, etc., and makes the superintendent the president of the corporation. . . . *These public corporations are made for public convenience; no private rights are involved in them; and, therefore, the Legislature in interfering with them is in no danger of violating the obligation of contracts*

*or public faith,** and although it may have thought proper to delegate a portion of its own legitimate power to such corporation, for the public benefit, yet the same may be resumed at any time, and exercised temporarily by the Legislature, at its discretion; or the corporation may at any moment be deprived of it altogether."

Mobile School Commissioners v. Putnam, 44 Ala., 506.

In 1826 the Legislature of Alabama created a *corporation* known as the Mobile School Commissioners. The funds of this corporation, which were intended for the advancement of education in that county, were to be derived wholly *from the bounties of the State and the United States* and from certain revenues accruing to the Treasurer of the county from fines, forfeitures, etc., "all of which were set apart as a fund, not for the benefit of the commissioners, but as a special fund for the endowment and support of schools in said county."

The Court says of this corporation:

"There was neither stock nor stockholders, nor was any consideration paid by them, nor by any other person, for the charter of incorporation, if such it can properly be called; it was wholly a matter of public concern, and for public benefit, and consequently *nothing in the nature of a contract was created** between the State and said Commissioners, or the people of the city and county of Mobile, either as a body corporate or as individuals. It was, and was intended to be in all its essential characteristics and attributes, *a public institution or corporation,** created for public purposes, and therefore subject to be altered, amended, or even repealed by the Legislature."

Trustees of the University of Alabama v. Winstead, 5 Stew. & Por., (Ala.) 17.

Here the Court, speaking of a like institution, says:

"If the property possessed by a corporation is altogether the property of the State; if the corporation have

*Italics ours.

paid nothing amounting to a valuable consideration for the act of incorporation; in fine, if there is no contract upon valuable consideration between the State and the corporators, it is a public corporation, and if it be public it is certainly within the complete control of the General Assembly."

State of Florida ex rel. v. Knowles, 16 Fla., 577.

Congress, by Act of 1862, granted certain public lands to be apportioned among the States, equal to 30,000 acres for each Senator and Representative, the moneys to be invested and to constitute a perpetual fund, and the interest to be appropriated to the endowment and support of at least one agricultural college. Florida thereupon incorporated the Florida Agricultural College, and a citizen donated 2,000 acres as a site.

The Legislature of 1877 removed the trustees and appointed others, and altered the form of organization and changed the location. The new trustees organized and demanded the property from the old trustees, which demand was refused. Suit was then brought.

The Court says:

"The next general proposition as to this statute is that it impairs the obligation of a contract. . . . The ground upon which this view is based is that this is a private corporation, not a public corporation. The corporation is itself *founded by the State through property derived from the Government of the United States.** These trustees are made by this Legislature the agents of the State to collect and disburse property appropriated by the general government to the State for a public purpose.

"There is not, and never was, any private property in the trustees in the funds. They were derived from the Government. The founder of this institution was the government of the State of Florida, and the property which constituted its basis was public moneys of the State of Florida, derived by it from the Government of the

*Italics ours.

United States, in trust for the establishment of an institution of this character.

"It never was the purpose of the State of Florida to give these trustees any private right to this property. Throughout the whole legislation they are shown to be *simple public agents to manage a public property.** The only right they have to it is by the legislation of the State, and every section of these acts shows that it was founded by public funds, and for a public purpose. 5 Stew. & Port., 23; 4 Wheat., 518.

"It may be true that any Legislature of the State appropriating these funds to any other purpose than that public purpose named in the Act of Congress might have been in bad faith, but that is a matter which does not concern these trustees, nor does this fact change the nature of the institution. . . .

"Holding their franchises subject to legislative action, legislation depriving them of them is due process of law."

Head v. Curators of University of Missouri, 47 Mo., 224.

The University of Missouri was established by the State. *Private citizens* of Boone County, in order to secure its location, subscribed $108,000 for its use, and an institution known as Columbia College gave to it its building and apparatus, valued at $10,000.

The Supreme Court of Missouri says with reference to the legal status of this university:

"But these contributions to the building fund did not constitute the contributors founders of the university. Nor did the contributions alter the nature of the foundation, or change the character of the corporation. (*University of N. C.* v. *Maultsby*, 8 Ired., 257.) Between this and the Dartmouth College case, and the cases following that decision, there is a broad distinction, namely, the difference that exists between a public institution of the State and a private corporation.

*Italics ours.

"The State entered into no compact with private parties. The State established an institution of its own and provided for its control and government through its own agents and appointees. The Act creating the institution in its first section declares that a 'university is hereby instituted in this State, the government whereof shall be vested in a board of curators.' The university is then declared a 'corporation and body politic,' and invested with certain powers. These powers are given into the hands of a board which was made subject to the pleasure of the legislature. This is not the way in which a private corporation is brought into being and endowed with corporate franchises. A private corporation involves the idea of private parties and private rights. No such parties or rights were concerned in the institution of the University of Missouri. By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes—a State University. (Ang. & Ames on Corp., Sec. 31–36; 5 Stew. & Port. (Ala.), 17; *Univ. of N. C.* v. *Maultsby*, 8 Ired, 257; *Bush* v. *Shipman*, 4 Scam. (Ill.), 190.)

Regents v. McConnell, 5 Nebraska, 423.

Under the Act of Congress authorizing the people of Nebraska to form a constitution and State Government, and providing for the admission of Nebraska into the Union, *the government had "granted to the State seventy-two sections of the unappropriated public lands, to be selected and located under the direction of the Legislature, for the use and support of a State university, and for no other purpose."** Thereafter the Legislature incorporated "the Regents of the University of Nebraska," and directed that the State Treasurer turn over to the treasurer of the corporation certain funds arising from the sale of said public lands. Later the Legislature abolished the office of treasurer of the corporation, and constituted the State Treasurer the custodian

*Italics ours.

of its funds. This Act was assailed as impairing the obligation of a contract. The Court held that the corporation was "not in any sense to be considered in the nature of a private eleemosynary corporation for the general promotion of learning, because its whole interests and franchises are the exclusive property and domain of the government itself, and therefore it is in the strictest sense a *public corporation*."*

Regents of University of Michigan v. Board of Education, 4 Mich., 224

The State chartered the university and turned over to it the control and management of a township of land, "which had been granted to Michigan by Congress for the use of a seminary of learning." The charter recited that the object of the university was "to provide the inhabitants of the State with the means of acquiring a thorough knowledge of the various branches of literature, science and the arts." The Court held that this was "a public corporation created for public purposes alone."

Thomas v. Industrial University, 71 Ill., 310.

In this case the Court says:

> "Is this university, then, a State institution, or is it a private corporation? It has been largely *endowed with funds by the State, received by donation for the purpose from the general government.** The Act by which it is organized places its control under the authority of the State. The Governor is required to appoint, and the Senate to confirm, the trustees who control the institution, except the Governor and Superintendent of Public Instruction are made *ex officio* members of the Board of Trustees, for the management of the fund, and the government of the university. . . . It was founded on donations from the general government, the County of Champaign, the Central Railroad, and it may be from private individuals. . . . Private individuals have no interest in or control over it, but it is, in every sense of the term, a State institution."

*Italics ours.

The Illinois Court was here again considering the very question presented in the case of *Board of Education* v. *Greenebaum*, *supra*, namely, whether a mechanic's lien could be asserted against the property of the corporation. The Court held that this case differed from the former one, and denied the right to a mechanic's lien on the ground that the institution was *a public corporation*.

Spalding v. People, 172 Ill., 48, 49 N. E., 995.

In this case it was again held, in reference to the same institution, the name of which had been changed to University of Illinois, that it was *a public corporation*, and that its Treasurer was therefore liable to indictment under a statute having reference to embezzlement by public officers.

Other cases to a like effect are *School Board* v. *Stuart*, 80 Va., 69; *Wambersie* v. *Orange Humane Society*, 84 Va., 453, 5 S. E., 28; and *Lewis* v. *Whittle*, 77 Va., 419.

The Act of 1881 is not repugnant to the Constitution of the United States. The lease of Carrick Academy was wise and beneficent. That corporation had not used its property for twenty or thirty years, and was without the means to do so, or the expectation of means. The lease preserved the property to the cause of education. By the terms of the Act and of the lease, the lessee was required to keep up and to make improvements on the property. When this lease expires public aid or private philanthropy may enable the institution to resume its career. A new generation will then applaud the wisdom that preserved this property, and will condemn the conduct of those who are now seeking to effect its sale and dissolution.

Respectfully submitted,

WILLIAM L. GRANBERY,
CHARLES C. TRABUE,
Solicitors for Defendants in Error

APPENDIX.

Exhibit 1.

Chap. 10. An Act to ratify and confirm an Act of the Congress of the United States of America, entitled, "An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same." *Passed September* 6, 1806.

Whereas, The United States, in Congress assembled, on the eighteenth day of April, in the year of our Lord one thousand eight hundred and six, passed an Act entitled "An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;" in the words following, to wit: "An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;

"1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That for the purpose of defining the limits of the vacant and unappropriated lands in the State of Tennessee, hereafter to be subject to the sole and entire disposition of the United States, the following line be, and hereby is established, to wit: Beginning at the place where the eastern or main branch of Elk River shall intersect the boundary line of the State of Tennessee; from thence running due north, until said line shall intersect the northern or main branch of Duck River; thence down the waters of Duck River to the military boundary line, as established by the seventh section of an Act of the State of North Carolina, entitled

'An Act for the relief of the officers and soldiers of the Continental line, and for other purposes' (passed in the year one thousand seven hundred and eighty-three); thence with the military boundary line west to the place where it intersects the Tennessee River; thence down the waters of the River Tennessee to the place where the same intersects the northern boundary line of the State of Tennessee.

"2. *And be it further enacted*, That upon the Senators and Representatives from the State of Tennessee, by an instrument signed and sealed by them, respectively, making known that in pursuance of the power in them vested by an Act of the General Assembly of Tennessee, entitled 'An Act to appoint agents to settle the dispute between this State and the United States, relative to the vacant and unappropriated lands within this State, and to procure the relinquishment of the claim of the United States to the same,' and by a resolution of the Senate and House of Representatives of the said State of Tennessee, passed in the year one thousand eight hundred and two, as instructed therein, they do, for and in behalf of the State of Tennessee, and in consideration of the provisions made in this Act, agree and declare that all right, title and claim which the State of Tennessee hath to the lands lying west and south of the lines hereinbefore established, within the limits of the State of Tennessee, shall thereafter forever cease, and that the lands aforesaid shall be and remain at the sole and entire disposition of the United States, and shall be exempted from every disposition or tax made by order or under the authority of the State of Tennessee, while the same shall remain the property of the United States, and for the term of five years after the same shall be sold; which said instrument shall be approved by the Senate of the United States, and entered at large in their journal, and deposited in the office of Secretary of State; the United States do thereupon cede and convey to the State of Tennessee all right, title and claim which the United States have to the territory of the lands lying east and north of the line hereinbefore established, within the limits of the State of Tennessee, subject to the same conditions as are

contained in the Act of the General Assembly of the State of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands therein described,' and the said State of Tennessee shall thereupon have as full power and authority to issue grants and perfect titles to all lands lying east and north of the before described line, within the limits of said State, as Congress now have, or the State of Tennessee might have, by virtue of an Act of the State of North Carolina, entitled 'An Act to authorize the State of Tennessee to perfect titles to lands reserved to this State by the cession act,' to which said Act the assent of Congress is hereby given, so far as is necessary to carry into effect the object of this compact; subject nevertheless to the following express conditions, that is to say:

"First. That all entries of land, rights of location and warrants of surveys, and all interfering locations which might be removed by the aforesaid Act of cession of the State of North Carolina, and which are good and valid in law, and which were not actually located west and south of the hereinbefore described line, before the twenty-fifth day of February, one thousand seven hundred and ninety, and all interfering grants which are good and valid in law, and which have been located east and north of the said line, shall be located and the titles thereto perfected within the territory hereby ceded to the State of Tennessee.

"Second. That the State of Tennessee shall appropriate one hundred thousand acres, which shall be located in one entire tract within the limits of the lands reserved to the Cherokee Indians by an Act of the State of North Carolina, entitled 'An Act for opening the land office for the redemption of specie and other certificates, and discharging the arrears due the army,' passed in the year one thousand seven hundred and eighty-three, and shall be for the use of two colleges, one in East and one in West Tennessee, to be established by the Legislature thereof; and one hundred thousand acres in one tract, within the limits last aforesaid, for the use of academies, one in each county in

said State, to be established by the Legislature thereof; which said several tracts shall be located on lands to which the Indian title has been extinguished, and subject to the disposition of the Legislature of the State, but shall not be granted or sold for less than two dollars per acre, and the proceeds of the sales of the lands aforesaid shall be vested in funds for the respective uses aforesaid, forever; and the State of Tennessee shall moreover, in issuing grants and perfecting titles, locate six hundred and forty acres to every six miles square in the territory hereby ceded, where existing claims will allow the same, which shall be appropriated for schools for the instruction of children forever: *Provided*, That nothing contained in this Act shall be so construed as to effect the Indian title, or to subject the United States to the expense of extinguishing the same; *And provided also*, That the lowest price of lands granted or sold within the ceded territory shall be the same as shall be established by Congress for the lands of the United States; *And provided, nevertheless*, That the people residing in said State, south of French Broad and Holston, and west of Big Pigeon Rivers, provided for by the Constitution of the State of Tennessee, shall be secured in their respective rights of occupancy and preëmption, and shall receive titles for such quantities as they may respectively claim, including their improvements, not exceeding six hundred and forty acres each, nor exceeding the quantities they have heretofore claimed, respectively, according to their conditional lines, where such have been established, at a price not less than one dollar per acre; *And provided further*, That nothing herein contained shall be construed to enable any person or persons until authorized by the Legislature of the State of Tennessee to locate any warrant issued under the authority of the State of North Carolina, within the limits of the lands reserved to the Cherokee Indians, by the fifth section of the Act of said State, entitled 'An Act for opening the land office for the redemption of specie and other certificates, and discharging the arrears due the army,' passed in the year one thousand seven hundred and eighty-three.

"3. *And be it further enacted*, That if the territory hereinbefore ceded to the State of Tennessee shall not contain a sufficient quantity of land fit for cultivation, according to the true intent and meaning of the original Act of cession, including the lands within the limits reserved by the State of North Carolina to the Cherokee Indians, to perfect all existing legal claims charged thereon, by the conditions contained in this Act of cession, Congress will hereafter provide by law for perfecting such as cannot be located in the territory aforesaid out of the lands lying west or south of the before described line.

"NATHL. MACON,
"Speaker of the House of Representatives.
"S. SMITH,
"President of the Senate, Pro Tem.

"Approved, April 18, 1806.
"TH. JEFFERSON."

Therefore, Be it enacted by the General Assembly of the State of Tennessee, That the same hereinbefore recited Act be, and the same is hereby accepted, ratified, and confirmed to all intents and purposes, by and on the part of the State of Tennessee, and that the provisions thereof be carried into effect.

EXHIBIT 2.

ACTS OF 1806, CHAPTER 8.

(Scott's Edition Laws of Tennessee, Vol. 1, p. 931.)

AN ACT to establish academies in the several counties in this State, and for the appointment of Trustees thereof.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Daniel Perkins, John Sappington, Nicholas T. Perkins, Chapman White, and Abraham Maury, Senior, shall be, and they are hereby created a body politic and corporate, to be known by the name of the Trustees of Harpeth Academy, in the County of Williamson.

That, etc., etc. (Here follows the appointment of other Trustees for other academies in other counties.)

SEC. 2. *Be it enacted*, That the Trustees of each of said academies, and their successors, by the names aforesaid, shall be capable in law to purchase, receive and hold, to them and their successors forever, any lands, tenements, rents, goods or chattels, which shall be given or devised to, or purchased by them for the use of said academies; and to sell and dispose of the same in such manner as to them shall seem most advantageous for said academies. The said Trustees by the names aforesaid may sue and be sued, plead and be impleaded in any court of law or equity. They shall have power from time to time to establish such by-laws, rules and ordinances, not contrary to the laws and constitution of this State, as they shall judge necessary for the good government of the said academies, and to appoint a President, Secretary, tutors, treasurer, and other persons necessary for conducting the business of the institution. A majority of said Trustees shall constitute a board to determine upon any matter relative to the establishment, government or support of their respective academies; but no

real estate belonging to either of the said academies shall be disposed of unless two-thirds of the Trustees thereof concur in opinion thereon. Upon the death, resignation, or other legal disability of any of the said Trustees hereby, or which may be hereafter appointed, the vacancy thereby occasioned shall be supplied by the next or any succeeding General Assembly after such vacancy may occur, but may, nevertheless, be supplied by the remaining Trustees, or a majority of them, until such vacancy or vacancies shall be supplied by the Legislature, as aforesaid.

The several Boards of Trustees shall each elect a treasurer, who shall receive all moneys accruing to the said academies, and property delivered to his care, and pay and deliver the same to the order of the said Trustees, and before he enters upon the execution of the duties of his office, shall give bond and security for such sum as the Board of Trustees by whom he is appointed shall direct, payable to them and their successors, and conditioned for the faithful discharge of the trust reposed in him, and that he will, when required by the said Trustees, render to them a true account of all moneys, goods and chattels received by him on account of, and for the use of, the said academy; and the treasurer shall receive such salary as may be allowed and fixed by the Trustees.

SEC. 3. *Be it enacted*, That the said Trustees shall have the power to fix on and purchase a site for their respective academies, and to take and receive subscriptions for paying for the same, as well as for the purpose of erecting and building the academy, and any other building which they may think necessary thereto, and if any person shall neglect or refuse to pay the money by him subscribed for that purpose, it shall be lawful for the said Trustees to recover the same by warrant before a justice of the peace, when the subscription shall not exceed fifty dollars; and where it shall exceed that sum, by motion in the court where the delinquent subscriber resides; *provided*, the party has ten days' previous notice of such motion. And if the

treasurer shall fail to render, when thereunto required, a just and true account of all moneys, goods and chattels which have come to his hands by virtue of his office, and also all expenditures relative to the said academy, he shall, on such failure, be subject to a judgment, on motion in any court of record in this State, and execution may thereupon be awarded in like manner as against sheriffs for the non-payment of public taxes.

SEC. 4. *Be it enacted*, That the Legislature may from time to time, at periods not less than two years distant from the other, appoint two additional Trustees to each board; *provided*, the number of Trustees for any of the aforesaid academies shall never exceed thirteen.

SEC. 5. *Be it enacted*, That until a President shall be elected for each of the said academies, and shall have entered upon the duties of his office, and also in all cases of a vacancy, or the absence of the President, the said Trustees shall appoint one of their number to preside in their meetings. All the doings and acts of the Trustees while acting under such circumstances shall be considered in law as the doings and acts of the board, as fully and completely as when the President of the Academy shall be in office and preside.

SEC. 6. *Be it enacted*, That it shall be the duty of the first person named as Trustee for each academy by this Act established to fix the time for holding the first meeting of the board, which shall be at the courthouse of the county in which such academy is established, or at the place of holding court for said county, of which he shall give notice in to each member, at least ten days previous to such meeting.

SEC. 7. *Be it enacted*, That this Act shall be deemed a public Act, and as such shall be judicially taken notice of without special pleadings in all courts of law and equity within this State.

ROBERT C. FOSTER,
Speaker of the House of Representatives.
JOSEPH MCMINN,
Speaker of the Senate.

September 13, 1806.

EXHIBIT 3.

ACTS OF 1809, CHAPTER 109.

(Scott's Edition, Laws of Tennessee, Vol. 1, p. 1198.)

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That . . . . William Metcalf, James Hunt, James Cunningham, Richard Calloway, Christopher Buller and George Taylor shall be and they are hereby constituted a body politic and corporate, to be known by the name of the Trustees of Carrick Academy, of the County of Franklin. . . . .

SEC. 2. *Be it enacted*, That the Trustees of each of the academies aforesaid, and their successors, by the names aforesaid, shall have the same powers, prerogatives and immunities, and be subject to the same rules, regulations and restrictions that are given to and prescribed for the Trustees of the academies of the other counties of this State, by an Act to establish academies in the several counties of this State, and for the appointment of Trustees thereof, passed September 13, 1806.

SEC. 3. *Be it enacted*, That this Act shall be in force from and after the passing hereof.

JOSEPH DICKSON,
Speaker of the House of Representatives.

JOSEPH MCMINN,
Speaker of the Senate.

Supreme Court of the United States.

No. 159.—October Term, 1906.

D. S. Osborne, J. K. P. Carroll, A. J. Barnes and G. L. Baker, suing as Trustees of Carrick Academy of the County of Franklin, &c., Plaintiffs in Error,
vs.
R. A. Clark and Winchester Normal College.

In Error to the Supreme Court of the State of Tennessee.

[February 25, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill to set aside a lease made by former trustees of Carrick Academy to the trustees of the Winchester Normal College, in pursuance of an Act of the General Assembly of Tennessee, authorizing the letting of the academy property to said lessees. The bill alleged that the act was contrary to the Constitution of the State for various reasons, but said nothing of the Constitution of the United States, and in no way implied a reliance upon any of its terms. An Act of Congress of April 18, 1806, was referred to, but was not alleged to be contravened. The defendants demurred, and the demurrer, after being overruled by the Court of Chancery Appeals, was sustained by the Supreme Court of the State. Tenn. . The case then was brought here by writ of error, and was argued both on the merits and upon a motion to dismiss.

The assignment of errors sets up that the above-mentioned State law impairs the obligation of contracts, contrary to the Constitution of the United States, although it does not show definitely what contract, or how that contained in the charter of Carrick Academy is impaired. It sets up, also, that the act is repugnant to the Act of Congress of April 18, 1806; and it alleges that the plaintiffs in error specially set up and claimed their rights in these respects in the Chancery Court of the State.

To show that the Constitution of the United States was relied upon below, the plaintiffs in error refer to passages in the opinions of the Court of Chancery Appeals and the Supreme Court, in which the Dartmouth College case, 4 Wheat. 518, was discussed, as establishing the point. But we are unable to see that those passages prove the fact. The Court of Chancery Appeals states the violations of the State Constitution set up in the bill, summarizes the questions presented by the bill and demurrer, and then addresses itself to answering those questions, suggesting no

others, and saying nothing about the Constitution of the United States. After a statement of historical facts, it says that if the act authorizing the lease is constitutional and the subject-matter of the act was under the control of the State, the case is at an end. If Carrick Academy is a public corporation, the State is assumed to have control. If it is a private corporation, the State Constitution is assumed to invalidate the statute by one of the clauses set up in the bill. The judge, speaking for himself, would regard the academy as a public corporation, but he yields to the weight of the decision in the Dartmouth College case, or at least to the principle of that case, according to which, as he conceives, the Academy is a private corporation, and therefore exempt from a diversion from its original charter purposes, such as the act authorizing the lease is assumed to effect. The objections to such a diversion that he is considering are those that he has stated as presented by the bill.—The Supreme Court, after stating the nature of the corporation and the relations and course of dealing of the State with it, and citing cases to prove that Carrick Academy is a public agency, refers to the decision below and the citation there of the Dartmouth College case only in order to show that that case was misapplied.

But the plaintiffs in error say further that the question of their rights under the Constitution of the United States necessarily was involved in a decision upon the bill, and that that is enough when the validity of a State law is concerned. *Columbia Water Power Co.* v. *Columbia Electric Street Ry., Light & Power Co.*, 172 U. S. 475, 488. *McCullough* v. *Virginia*, 172 U. S. 102, 117. These and similar cases, however, are not to be pressed to the point that, whenever it appears that the State law logically might have been assailed as invalid under the Constitution of the United States, upon grounds more or less similar to those actually taken, the question is open. If a case is carried through the State Courts upon arguments drawn from the State Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. *Crowell* v. *Randell*, 10 Pet. 368, 398. *Simmerman* v. *Nebraska*, 116 U. S. 54. *Hagar* v. *California*, 154 U. S. 639. *Erie Railroad* v. *Purdy*, 185 U. S. 148, 153.

We are the less uneasy at the conclusion to which we are forced, that we do not apprehend that the statute of Tennessee is invalid for the reason now put forward. That reason is that the General Assembly of the State had no authority to authorize the taking of the property of this corporation for the private use of another. This objection might be urged with some force perhaps to the lease that was made. But the statute, which alone could be brought in question here, merely authorized the trustees of

Carrick Academy to let the academy property to the trustees of the Winchester Normal College for not more than fifty years, and required the trustees of the college to keep the property in good condition and free from debt or incumbrance, if the lease was made. It said nothing about terms. It left the academy free. There was no taking of property, but at most an authority to change an investment. So far as the Act shows on its face, which is all that we have before us, it might have contemplated a lease of the present grounds merely as a means to keeping up the academy with increased resources in a better place elsewhere.

Writ of Error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S